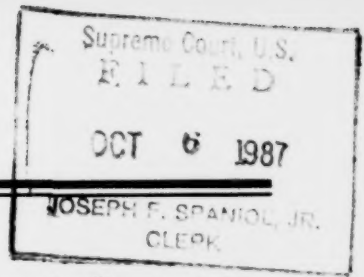


87 No. 560



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FMC WYOMING CORPORATION,
Petitioner,

v.

DONALD P. HODEL, Secretary of Interior, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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QUESTION PRESENTED

Whether or not Congress *sub silentio* revoked vested federal coal lease rights when it enacted the Federal Coal Leasing Amendments Act of 1975.

LIST OF PARTIES

FMC Wyoming Corporation, Petitioner, v. Donald P. Hodel, as Secretary of the United States Department of the Interior; Robert F. Burford, as Director of the Bureau of Land Management, United States Department of the Interior; Jim H. Taylor, as Chief, Branch of Solid Minerals, Wyoming State Office, Bureau of Land Management; Marla B. Bohl, as Former Chief, Land and Mining, Wyoming State Office, Bureau of Land Management; Harold G. Stinchcomb, as Former Chief, Branch of Energy Minerals, Wyoming State BLM Office; J. Stan McKee, as Former Acting Chief, Branch of Solid Minerals, Wyoming State Bureau of Land Management; and the United States Department of the Interior, Respondents.

RULE 28.1 LISTING

The parent company is FMC Corporation. Subsidiaries (except wholly-owned subsidiaries) and Affiliates include CBV—Industria Mecanica, S.A.—(Brazil); Centocor, Inc.; FMC Gold Company; and Teknowledge, Inc.

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No. _____

FMC WYOMING CORPORATION,
v. *Petitioner,*

DONALD P. HODEL, Secretary of Interior, *et al.,*
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

FMC Wyoming Corporation ("FMC") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered on April 9, 1987, which held that section 6 of the Federal Coal Leasing Amendments Act of 1975¹ automatically applies as a matter of law upon readjustment of federal coal leases issued before the FCLAA was enacted.

OPINIONS BELOW

The Opinion of the United States Court of Appeals, reproduced as Appendix A, is reported at 816 F.2d 496. The Opinion of the United States District Court for the District of Wyoming, reproduced as Appendix B, is re-

¹ Although not actually passed until 1976, the Act is commonly known as the Federal Coal Leasing Amendments Act of 1975 and will be referred to as such throughout this Petition.

ported at 587 F. Supp. 1545. The Decision of the United States Department of the Interior, Interior Board of Land Appeals, reproduced as Appendix C, is reported at 74 IBLA 389. The Decision of the Wyoming State Office, Bureau of Land Management is reproduced as Appendix D.

JURISDICTION

The Judgment of the Court of Appeals was entered on April 9, 1987. A Petition for Rehearing was filed on May 22, 1987, and denied on July 8, 1987. Jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari exists under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

Section 6 of the Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. § 207 (1982). Because analysis of the issues presented also requires consideration of other portions of the FCLAA, the Act is attached in its entirety as Appendix E.

STATEMENT OF THE CASE

On March 1, 1963, FMC and the Secretary of Interior ("Secretary" or "Interior") entered into two federal coal leases covering lands located near Kemmerer, Wyoming. The basic contract and property rights conveyed by the leases were established by section 7 of the Mineral Lands Leasing Act of 1920, and the terms of the leases. Section 7 of the 1920 Act provided:

[Coal] Leases shall be for indeterminate periods upon condition of diligent development and continued operation of the mine or mines . . . and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods.

30 U.S.C. § 207 (1970). The 1920 Act also provided for payment of royalties on coal produced in an amount determined by the Secretary, but not less than five cents per ton. *Id.*

FMC's leases incorporated this statutory language and granted FMC the right to mine federal coal for an indeterminate term, subject only to "reasonable" readjustment every twenty years:

The lessor, in consideration of the rents and royalties to be paid and the conditions to be observed as hereinafter set forth does hereby grant and lease to the lessee the exclusive right and privilege to mine and dispose of all the coal in the following-described tracts of land. . . .

[The lessor expressly reserves:] The right *reasonably* to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20 year period during the continuance of this lease unless otherwise provided by law at the expiration of any such period. . . .

Appendix F at 57a, 63a, 71a, 77a; Record at 59-61; 174-176; 62-65; 319-323 (emphasis added). The royalty imposed by the Secretary in FMC's leases was seventeen and one-half cents per ton. *Id.* Relying on the rights created by these leases, FMC spent millions of dollars developing its Skull Point mine. FMC also spent 70 million dollars to convert boilers from natural gas to coal power at FMC's Trona Plant near Green River, Wyoming. Appendix H at 128a-129a; Record at 86.

Thirteen years after FMC's leases were issued, Congress passed the Federal Coal Leasing Amendments Act of 1975 ("FCLAA"), 30 U.S.C. § 181, *et seq.*, which substantially revised the coal leasing portions of the original Mineral Lands Leasing Act. Among other things, section 6 of the FCLAA amended section 7 of the Mineral Lands Leasing Act, creating for the first time

“primary term” federal coal leases much different than the indeterminate term coal leases Congress originally developed under section 7 of the Mineral Lands Leasing Act. Instead of conveying an indefinite right to mine coal, the new coal leases convey only a twenty year “primary term” during which coal must be produced within ten years or the lease expires. In addition, the readjustment period has been shortened from twenty years to ten and, of fundamental importance here, a new minimum royalty rate of $12\frac{1}{2}\%$ of the value of the coal produced has been created:

A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. . . . A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than $12\frac{1}{2}\%$ per centum of the value of coal as defined by regulation. . . . Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

30 U.S.C. § 207(a) (1982) ; Appendix E at 45a.

Congress expressed no intent in section 6 of the FCLAA that the new primary term leases created by that section—and their minimum $12\frac{1}{2}\%$ royalty rate—had to be applied upon readjustment of the 533 pre-FCLAA indeterminate term leases issued by Interior under section 7 of the Mineral Lands Leasing Act. After several years of indecision, however, Interior decided it was obligated as a matter of law to replace existing indeterminate term coal leases with the new primary term coal leases as those pre-FCLAA indeterminate term leases became subject to readjustment. *Whether Leases Issued Prior to Aug. 4, 1976, Subject To Readjustment After That Date Must Be Readjusted To Conform To The Federal Coal Leasing Amendments of 1976*, Opinion

By Office of Solicitor #M-36939, 88 Interior Dec. 1003 (September 17, 1981). As a result, when FMC's leases became subject to readjustment in early 1983, Interior sent FMC two new primary term coal leases, each of which incorporated the provisions of section 6 of the FCLAA. Appendix G; Record at 68-74; 121-123; 254-256. These new leases conveyed a primary term of twenty years, shortened the readjustment period from twenty years to ten, and imposed a 1000% increase in FMC's royalty rate. Appendix G; Record at 68-74; 121-123; 254-256; Appendix H at 120a-125a; 126a; Record at 75-78; 113-116; 247-250. Arguing it was legally compelled to impose section 6 of the FCLAA at readjustment, Interior made no effort to determine if these new leases were "reasonable" in light of the circumstances of FMC's existing operations, contrary to the express terms of FMC's leases.

FMC appealed the readjustment to the Interior Board of Land Appeals, arguing it was entitled to the reasonable readjustment called for under the terms of its pre-FCLAA leases. The Interior Board of Land Appeals upheld the readjustment, however, relying upon a Solicitor's Opinion which had concluded that section 6 of the FCLAA must be imposed at readjustment as a matter of law. *FMC Corp.*, 74 IBLA 389 (1983); see Solicitor's Opinion #M-36939, *supra*.² Invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1361, FMC appealed to the United States District Court for the District of Wyoming. The district court reversed, holding that Interior could not impose the newly created "primary term" coal leases—and their minimum 12½% royalty—under the guise of readjusting the existing indeterminate term leases. The court concluded that to do so would interfere with vested lease rights. Since section 6 of the FCLAA did not even mention pre-FCLAA leases, much

² FMC also objected to the timeliness of the readjustment. FMC does not seek review of the Tenth Circuit's decision on that issue.

less clearly express an intent that they be altered, the district court held that section 6 of the FCLAA as a matter of law did not apply to pre-FCLAA leases at readjustment. FMC was entitled to a "reasonable" readjustment of its lease terms, which necessarily entailed a consideration of the facts and circumstances pertaining to FMC's leases. *FMC Wyoming Corp. v. Watt*, 587 F. Supp. 1545, 1548 (D. Wyo. 1984).

The Secretary appealed this portion of the district court's Order and the Tenth Circuit reversed, holding that section 6 of the FCLAA as a matter of law did apply to pre-FCLAA leases. *FMC Wyoming Corp. v. Hodel*, 816 F.2d 496 (10th Cir. 1987). The Tenth Circuit focused on language in the 1920 Act that the leases were subject to the "condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, *unless otherwise provided by law at the time of the expiration of such periods.*" 30 U.S.C. § 207 (1970) (emphasis added). Although FMC argued that Interior's unilateral imposition of the new primary term leases effectively destroyed many of the contract and property rights created by FMC's indeterminate term leases, the Tenth Circuit held that section 6 of the FCLAA "otherwise provided" and applied to pre-FCLAA leases at readjustment because nothing in the Act indicated it should not. *FMC Wyoming Corp. v. Hodel*, 816 F.2d 496, at 501 (10th Cir. 1987).

REASONS FOR GRANTING THE WRIT

If the Tenth Circuit decision is allowed to stand, almost 500 vested contracts, covering more than sixteen billion tons of federal coal,³ will have been revoked and

³ At the time the FCLAA was enacted there were 533 existing coal leases. As of March 1986, there were 489 pre-FCLAA leases still in effect covering sixteen billion tons of coal. United States Congress Office of Technology Assessment Special Report, "Po-

replaced with new and less substantial contracts based on the language of a statute which does not mention *the existing contracts*. The effect of this decision will be to sanction *unreasonable* readjustments, and to replace existing leases with substantially different leases and an increased royalty rate at some *ten* times the existing rate. As the Tenth Circuit conceded, this result is reached without a shred of evidence that Congress intended to do so in 1976.

Since this Court has repeatedly held that statutes will not be construed to impair existing contract and property rights absent express language compelling that result,⁴ the Tenth Circuit's decision either squarely conflicts with settled Supreme Court precedent or stands for the indefensible proposition that federal mineral leases do not convey significant contract or property rights. Either proposition has tremendous ramifications, since the Tenth Circuit's decision affects hundreds of vested mineral leases. Until now, federal mineral leases have always been held to convey significant contract and property rights. The Tenth Circuit's decision calls that principle into question, however, since it permits Interior to rewrite existing mineral leases even though Congress has expressed no intent that this should occur. Ultimately at stake, therefore, is the basic integrity of all federal mineral leases. Given the importance of this issue to the entire mineral industry, as well as to the nearly 500 owners of pre-FCLAA coal leases, the Tenth Circuit's decision warrants review.

tential Effects of Section 3 of the Federal Coal Leasing Amendments Act of 1976," at 43 (March 1986).

⁴ See, e.g., *Farmers and Mechanics Savings Bank of Minneapolis, v. Minnesota*, 232 U.S. 516, 528 (1914), where this Court declared that an intent to impair the obligation of a contract of the United States "should not be presumed without the clearest legislative language requiring it."

I. The Tenth Circuit's Decision Squarely Conflicts With Supreme Court Precedent.

Congress deliberately chose indeterminate term coal leases over primary term coal leases when it enacted the Mineral Lands Leasing Act in recognition of the tremendous investment in time and money needed to develop coal. Solicitor's Opinion #M-36939, *supra*, 88 Interior Dec. 1003, 1005 (1981); 51 Cong. Rec. 14,945 (1914) (statement of Rep. Thompson). The contract and property rights created by the indeterminate term coal leases issued under that Act are therefore vastly more substantial than those created and conveyed by the primary term coal leases created by section 6 of the FCLAA. Indeterminate terms have been reduced to twenty-year primary terms, readjustment now occurs every ten years instead of every twenty, coal leases are no longer subject only to judicial cancellation, and production must occur within ten years or the lease expires. *Cf. Ross v. City of Berkeley*, 655 F. Supp. 820 (N.D. Cal. 1987) (changing a term lease to an indeterminate term lease constituted a taking of the lessor's reversionary interest). Moreover, royalties have arbitrarily been increased ten times their previous amount, with absolutely no consideration of the facts and circumstances at FMC's mines or the "reasonableness" of the new rate.

Converting the almost 500 indeterminate term pre-FCLAA leases into primary term leases at readjustment, and dramatically increasing the royalty rate, substantially diminishes the contract and property rights represented by the pre-FCLAA leases. For this reason, FMC has consistently maintained that section 6 of the FCLAA applies only to new federal coal leases, because Congress expressed no intent that existing leases be altered:

[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not con-

template when they were performed. The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Union Pacific Railroad v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913) (citations omitted); see also *Greene v. United States*, 376 U.S. 149 (1964).

The Tenth Circuit, however, held that section 6 of the FCLAA and the "unless otherwise provided" clause applied to pre-FCLAA leases because nothing in the FCLAA or its legislative history indicated it should not apply. *FMC Wyoming Corp. v. Hodel*, 816 F.2d at 501. Surely, such a radical change in the terms of existing contracts must be based on more than mere silence. The "unless otherwise provided" clause cannot cause the FCLAA to apply in the absence of plainly expressed congressional intent to do so. The Tenth Circuit's reasoning flatly conflicts with Supreme Court precedent, since this Court has repeatedly held that statutes which would substantially disrupt pre-existing contract and property rights must be presumed to operate only prospectively. *Bennett v. New Jersey*, 470 U.S. 632, 638 (1985). By taking the opposite approach, the Tenth Circuit ignored the long-followed rule that "retrospective operation will not be given to a statute which interferes with antecedent rights. . . ." *Union Pacific Railroad Co. v. Laramie Stock Yards Co.*, 231 U.S. at 199; *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982).

The Tenth Circuit's decision also conflicts with the settled principle that statutes should be construed to avoid constitutional issues. *Lorillard v. Pons*, 434 U.S. 575, 577 (1978); *United States v. Security Industrial Bank*, 459 U.S. 70 (1982). As FMC pointed out in its brief, the application of section 6 to pre-FCLAA leases

raises substantial fifth amendment taking issues. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). In addition to reducing the real property estate conveyed by the indeterminate term leases, blanket imposition of section 6 may force some pre-FCLAA lessees to abandon valuable coal deposits. In FMC's case, for example, the new 12½% minimum royalty will likely require FMC to abandon millions of tons of otherwise mineable coal.⁵ As this Court recently suggested, making it commercially impossible to mine coal may constitute a taking, and FMC has consistently pointed out that this is the case here. *Keystone Bituminous Coal Association v. De Benedictis*, 480 U.S. —, 107 S.Ct. 1232, 1247-48 (1987); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

Given the substantial disruption of existing rights caused by forcing section 6 of the FCLAA onto the pre-FCLAA lessees, it is clear the Tenth Circuit applied the wrong principle of statutory construction. This departure from precedent has tremendous implications, as more than sixteen billion tons of federal coal are dedicated to pre-FCLAA leases. In addition, approximately 90% of the nearly 500 pre-FCLAA leases are located within the jurisdiction of the Tenth Circuit.⁶ All of

⁵ FMC's mines have dipping coal seams, which require ever increasing amounts of overburden to be removed. This causes the cost of mining to increase continuously, and any cost of mining which cannot be passed through to customers will cause FMC to stop mining earlier than would otherwise be the case. FMC has calculated that the 1000% royalty increase caused by the section 6 minimum royalty will cost FMC 3½ to 4½ million tons of coal. Worse yet, FMC will be left with a royalty rate 1000% higher than that imposed on the neighboring coal mine, whose readjustment was waived by Interior. Appendix H, Record at 75-78; 113-116; 247-250; 84-95. This is clearly unreasonable, despite the "reasonable" readjustment language of its leases. That contractual right has been taken, however, by Interior's mandatory application of the new primary term leases.

⁶ See n.3, *supra*, at 42-43.

these leases are affected by the Tenth Circuit's decision. Until now, coal leases were thought to convey substantial property rights. See, e.g., *Rosebud Coal Sales Co. v. Andrus*, 667 F.2d 949, 951 (10th Cir. 1982). In holding that Congress revoked these fundamental lease rights *sub silentio*, however, the Tenth Circuit has ignored that well established principle. *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978); *Union Oil Co. of California v. Morton*, 512 F.2d 743, 747, 751 (9th Cir. 1975).

II. The Tenth Circuit's Decision Creates Taking Issues of First Impression Which Strike at the Heart of All Federal Mineral Leases.

Because the application of section 6 of the FCLAA to pre-FCLAA leases represents a substantial diminution in the contract and property rights represented by the pre-FCLAA leases, the Tenth Circuit's decision if upheld will force pre-FCLAA lessees to litigate the extent to which Congress constitutionally may diminish without compensation the rights conveyed by federal coal leases. Many coal lessees, like FMC, have invested millions of dollars in reliance upon the property and contract rights represented by their leases. Diminishing those rights therefore raises complex fifth amendment issues. Cf. *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (shortening a vested lease can constitute a taking); and see *First English Evangelical Lutheran Church v. Los Angeles*, — U.S. —, 107 S.Ct. 2378 (1987) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (if regulation goes too far it will be recognized as a taking)); *Nollan v. California Coastal Commission*, — U.S. —, 107 S.Ct. 3141 (1987) (conditioning grant of permission to rebuild a house on property owners' transfer to public of beachfront property constitutes a taking for which the California Coastal Commission must pay the owners compensation).

In fact, the issues raised are of first impression and will affect all federal coal leases, and possibly all mineral

leases issued under the Mineral Lands Leasing Act. This Court has never considered the extent to which federal mineral leases create property rights, nor has this Court ever been called upon to define the limits of congressional authority to alter existing mineral leases under its reserved powers. Those issues are squarely framed here, however, if the Tenth Circuit's decision is allowed to stand. Although Interior argued below that no "taking" can occur with changes in federal coal leases since Congress initially reserved the power to "readjust" those leases every twenty years, citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 106 S.Ct. 2390 (1986), it does not follow that Congress constitutionally can rewrite with impunity leases the government has already entered into, even under its reserved legislative powers. Congress specifically intended to induce tremendous private investment when it created indeterminate term coal leases. 51 Cong. Rec. 14,945 (1914) (statement of Rep. Thompson). Those leases therefore represent substantial property rights and Congress may not "readjust" them out of existence without compensation. Congress' ability to change its mind is necessarily limited by the fifth amendment. *Sinking-Fund Cases*, 99 U.S. 700, 720-721 (1879); see *Perry v. United States*, 294 U.S. 330, 351 (1935) (due process clause may limit Congress from annulling contractual obligations); *Lynch v. United States*, 292 U.S. 571, 579 (1934).

The complex taking issues created by the Tenth Circuit's decision should not have arisen, as Congress never clearly expressed an intent to revoke existing coal lease rights upon readjustment. By ignoring statutory construction rules established by this Court, however, the Tenth Circuit has raised the specter of constitutional litigation. Since the Tenth Circuit's decision affects hundreds of leases covering billions of tons of coal, it will not go unchallenged. Before difficult fifth amendment

issues are litigated, however, this Court should decide whether or not they need be.⁷

III. The Tenth Circuit's Opinion Ignored Explicit Congressional Efforts to Avoid Taking Issues.

Congress explicitly sought to avoid taking issues when it enacted the FCLAA. Recognizing it could not impose fundamental policy changes on existing leases without running into fifth amendment limitations, Congress carefully drafted the FCLAA to avoid unnecessary disruption of existing coal lease rights. This was clearly the case, for example, with section 3 of the FCLAA. To spur pre-FCLAA leases into production, Congress enacted a provision denying existing lessees new federal mineral leases if they did not develop their pre-FCLAA coal leases within ten years of enactment of the FCLAA. 30 U.S.C. § 201(a)(2)(A) (1982). Significantly, this provision very carefully avoided interfering with the contract rights created by the pre-FCLAA coal leases themselves, by only denying non-producing pre-FCLAA lessees the opportunity to obtain *new* leases. Section 6, on the other hand, provides that new leases must produce commercial quantities in ten years, or else they will be terminated. Applying this provision to pre-FCLAA leases therefore threatens those leases with termination, defeating the entire purpose behind the carefully thought-out production incentives contained in section 3. By sanctioning Interior's attempt to impose section 6 of the FCLAA onto pre-FCLAA leases, therefore, the Tenth Circuit's opinion raises the precise taking issues Congress tried to avoid:

[We do not] wish to trigger sticky constitutional questions involving the taking of legislatively con-

⁷ This Court has frequently stated that it will not attribute to Congress an intent, in the enactment of a statute, to defy a provision of the Constitution, "or even to come so near to doing so as to raise a serious question of constitutional law." *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 307 (1924).

ferred rights to reacting to the deficiencies of current leasing law with the retroactive application of tough new lease standards and terms to lessees who legally gained their rights relying on the provisions of current law. Rather, Mr. Chairman, it is the purpose of the legislation before us today to insure that any future leasing and lease administration is carried out under congressionally mandated guidelines that will require a fair return to the public, diligent, efficient, and orderly development and production of the coal resources in a leasing tract, and adequate environmental and social planning.

122 Cong. Rec. 488 (1976) (statement of Rep. Mink, principal author of the FCLAA).

The Tenth Circuit's reliance on the "unless otherwise provided by law" clause of the 1920 Act does not avoid the taking issue. In the absence of clear legislative intent to apply FCLAA upon readjustment of pre-FCLAA leases, that provision is not triggered. As the Tenth Circuit admitted, there is not clear legislative intent. The Tenth Circuit's analysis is in error.

CONCLUSION

The decision by the Tenth Circuit squarely conflicts with United States Supreme Court precedent and calls into question the basic contractual integrity of all federal mineral leases. It permits Interior to revoke fundamental rights held under hundreds of existing federal coal leases even though the statute relied upon to do so does not mention those leases or otherwise authorize Interior to do so. For these reasons, it is respectfully submitted that this petition for certiorari should be granted.

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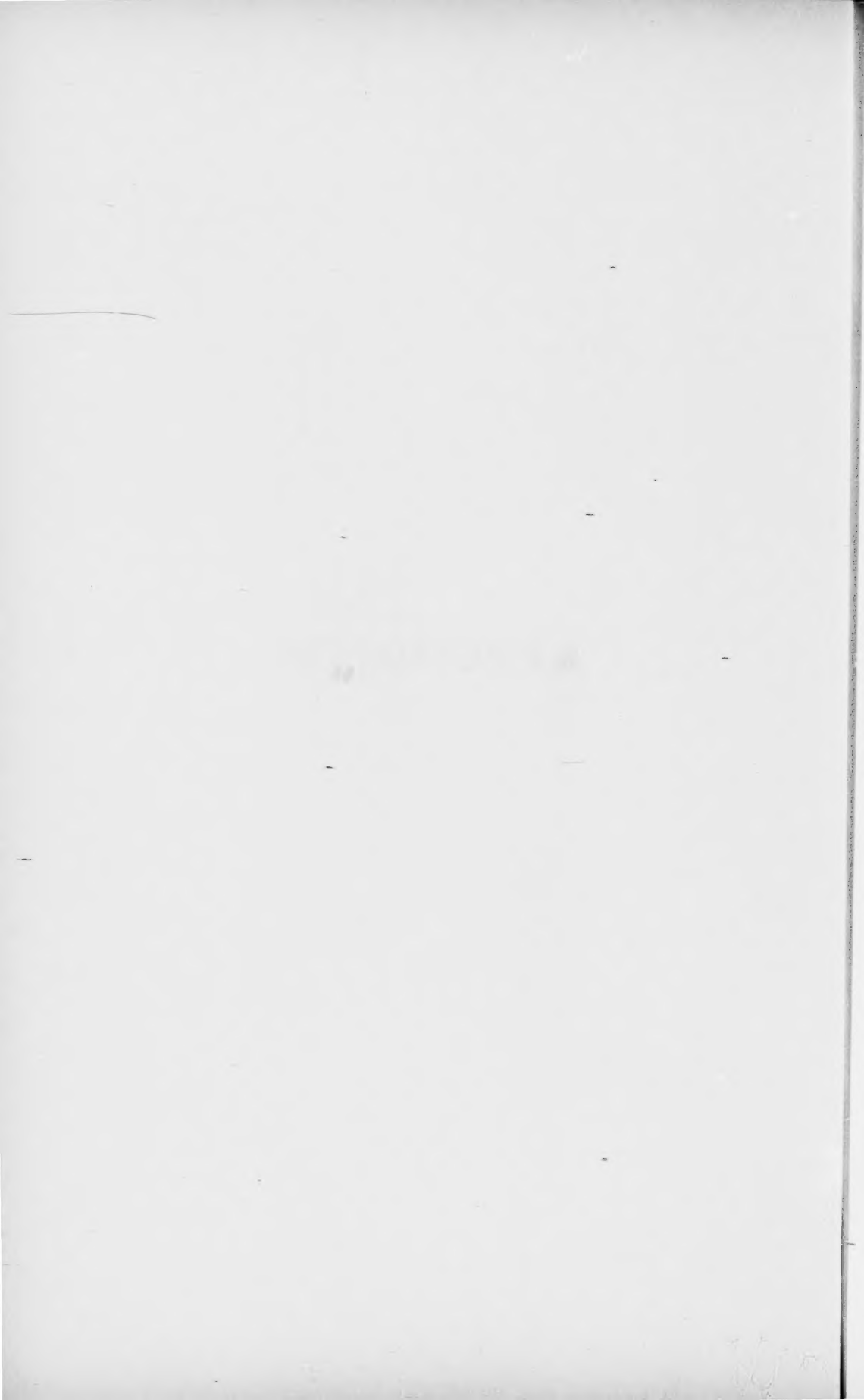
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October 1987



APPENDICES



APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 84-2175, 84-2208

FMC WYOMING CORPORATION,
Plaintiff-Appellee/Cross-Appellant,

v.

DONALD P. HODEL, as Secretary of the United States Department of the Interior; ROBERT F. BURFORD, as Director of the Bureau of Land Management, United States Department of the Interior; JIM H. TAYLOR, as Chief, Branch of Solid Minerals, Wyoming State Office, Bureau of Land Management; MARIA B. BOHL, as Former Chief, Land and Mining, Wyoming State Office, Bureau of Land Management; HAROLD G. STINCHCOMB, as Former Chief, Branch of Energy Minerals, Wyoming State BLM Office; J. STAN MCKEE, as Former Acting Chief, Branch of Solid Minerals, Wyoming State Bureau of Land Management; and the UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendants-Appellants/Cross-Appellees,

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; NORTHERN STATES POWER COMPANY; PEABODY HOLDING COMPANY, INC.; SYSTEM FUELS, INC.; WESTERN COAL TRAFFIC LEAGUE; COLOWYO COAL COMPANY,
Amicus Curiae.

April 9, 1987

Rehearing Denied in No. 84-2175
July 8, 1987

Marilyn S. Kite (Patrick R. Day of Holland & Hart, with her, on the briefs), Cheyenne, Wyo., for plaintiff-appellee/cross-appellant.

Jean A. Kingrey, Sp. Litigation Counsel, Dept. of Justice (F. Henry Habicht II, Asst. Atty. Gen., Robert Klarquist, Atty., Dept. of Justice, of counsel, Lyle K. Rising and Stephen Brown, Office of Sol., Dept. of Interior, with her, on brief), Washington, D.C., for defendants-appellants/cross-appellees.

L. Christian Hauck and John R. McNeill, Montrose, Colo., for amicus curiae Colorado-Ute Elec. Ass'n.

Jack F. Sjöholm, Minneapolis, Minn., for amicus curiae Northern States Power Co.

Terry O'Connor, Denver, Colo., for amicus curiae Peabody Holding Co., Inc. and System Fuels, Inc.

Jon N. Halverson and Charles L. Kaiser of Davis, Graham & Stubbs, Denver, Colo., for amicus curiae Colowyo Coal Co.

William L. Slover, C. Michael Loftus, Donald G. Avery and Pauline E. Waschek of Slover & Loftus, Washington, D.C., for amicus curiae Western Coal Traffic League.

Before LOGAN, MOORE, and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

This dispute concerns a readjustment by the Secretary of the Interior of the terms and conditions of two coal leases between the United States and FMC Corporation, a Delaware corporation with its principal place of business in Chicago, Illinois, and qualified to do business in Wyoming. On administrative appeal, the Interior Board of Land Appeals (IBLA) held that the royalty readjustment was timely and that the adjusted royalty rate was lawful. *FMC Corp.*, 74 IBLA 389 (1983).

Thereafter, FMC Corporation filed a petition for review in the United States District Court for the District of Wyoming.¹ On cross-motions for summary judgment the district court affirmed, in part, and reversed, in part, the decision of the IBLA, the district court holding that the royalty readjustment was timely but unlawful. *FMC Wyoming Corp. v. Watt*, 587 F.Supp. 1545 (D.Wyo. 1984). Both parties appeal. We affirm, in part, and reverse, in part, the judgment of the district court, holding that the royalty readjustment was both timely and lawful. This case is a companion case to *Coastal States Energy Co. v. Hodel*, 816 F.2d 502 (10th Cir. 1987).

Our starting point is the Mineral Lands Leasing Act of 1920 (MLLA). 41 Stat. 437 (1920), *amended by* 30 U.S.C. § 201 et. seq. (1976). That Act provided, *inter alia*, that the Department of Interior could issue leases on federal lands for an indeterminate term to private parties to mine and remove coal at a royalty rate to be fixed by the Secretary, such rate, however, not to be less than five cents per ton of coal and subject to the right of the Secretary to readjust the terms and conditions of the lease, including the royalty rate, at the end of each 20-year period following the issuance of the lease.²

On March 1, 1963, the two leases here involved were entered into by the Secretary of the Interior, on behalf

¹ After instituting the present proceeding, FMC Corporation assigned its interest in the two leases to FMC Wyoming Corporation, and the latter was substituted as the plaintiff in this proceeding. However, FMC Wyoming Corporation will hereinafter be referred to as simply FMC.

² Specifically, Section 7 of MLLA (1920) provided as follows:

[l]eases shall be for an indeterminate period . . . upon the further condition that at the end of each 20-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the expiration of such periods.

of the United States, and FMC. The leases covered land near Kemmerer, Wyoming, now known as the Skull Point Mine. Both leases were made subject to MLLA (1920) and called for a royalty payment of $17\frac{1}{2}$ cents per ton of coal while providing for periodic readjustment of the terms and conditions of the leases at 20-year intervals.³

On August 4, 1976, the Federal Coal Leasing Amendments Act (FCLAA) was enacted by Congress which amended much of the Act of 1920. 30 U.S.C. § 201 et seq. (1982). FCLAA (1976) included a provision that royalty on a coal lease shall be in such amount as the Secretary shall determine, but not less than $12\frac{1}{2}\%$ of the value of the coal.⁴ 30 U.S.C. § 207 (1982).

The 20-year anniversary date on the two coal leases held by FMC was March 1, 1983. On August 23, 1982, some six months before the March 1, 1983, anniversary date, the Bureau of Land Management (BLM) sent formal notice to FMC of its intent to readjust the terms and conditions of these two leases on their anniversary dates.⁵ On December 22, 1982, 68 days prior to the

³ Specifically, both of FMC's leases reserved the following right to the lessor:

[t]he right reasonably to readjust and fix royalties payable thereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

⁴ Exempted from the $12\frac{1}{2}\%$ royalty rate was coal recovered by underground mining. The rate for this coal was left to the discretion of the Secretary. 30 U.S.C. § 207 (1982). However as the leases held by FMC cover only surface mined coal, the statutorily set rate of $12\frac{1}{2}\%$ is the only rate at issue in this case.

⁵ This notice informed FMC that "the lease terms and conditions will be readjusted under the provisions of 43 C.F.R. § 3451." The cited regulation provided that the lease royalty shall be readjusted

March 1, 1983, anniversary date, the terms of BLM's readjustments were sent FMC. Included in these readjustments was a readjusted royalty rate of 12½% of the value of the coal mined. The notice of the adjustments provided that the readjustments would become effective on March 1, 1983, the 20-year anniversary date of the two leases, but, at the same time, allowed FMC 60 days to file any objections. FMC filed objections on February 11, 1983. These objections were dismissed by the BLM on April 6, 1983. FMC appealed the BLM decision to the IBLA, the latter upholding the BLM's decision on July 29, 1983. 74 IBLA 389 (1983). FMC thereafter sought judicial review of the IBLA's decision in the United States District Court for the District of Wyoming.

No. 84-2208

The district court held that the Secretary's readjustment of the royalty rate in FMC's leases was timely. FMC appeals from that part of the district court's final judgment. We are in accord with the district court's resolution of this matter.

Section 7 of MLLA (1920) stated that "readjustments" may be made "at the end of each 20-year period succeeding the date of the lease. . . ." ⁶ In line with the provisions in section 7 of MLLA (1920), FMC's leases also reserve to the Secretary the right to readjust the terms and conditions of the lease "at the end of 20 years from the date hereof [the date of the lease]. . . ." As stated, FMC's two leases were dated March 1, 1963, and, accordingly, the 20-year anniversary date for both leases

to conform to the minimum rate proscribed in § 3473.3-2. 43 C.F.R. § 3451.1(a)(2) (1986). Section 3473.3-2(a)(2) required a royalty of not less than 12½% of the value of the surface mined coal.

⁶ FCLAA's § 6 which replaced § 7 of the MLLA (1920) adopted the same language requiring readjustment to be "at the end of" the applicable term. 30 U.S.C. § 207 (1982).

was March 1, 1983. It is uncontested that BLM gave FMC notice on August 23, 1982, over six months before the anniversary date of the two leases, that BLM intended to readjust the terms and conditions of the two leases.

FMC's position on the timeliness issue is that under MLLA (1920) and the leases here involved the *final* decision of the BLM to readjust terms and conditions of an existing coal lease may not occur *after* the 20-year anniversary date of the lease involved. In this case, the *final* action of the BLM readjusting the terms and conditions of FMC's leases occurred on April 6, 1983, 37 days after the anniversary date of the two leases, i.e., March 1, 1983. Thus, argues FMC, the readjustments of the existing leases did not occur "at the end" of 20 years after the date of the lease, as required by MLLA (1920) and the leases themselves.

The Secretary's position is that there is compliance with both the statute and the language of the leases if the notice of intent to readjust is given the lessee *prior* to the 20-year anniversary date.⁷ In the instant case, such notice was given more than six months prior to the 20-year anniversary date. Moreover, the Secretary points out that, though under regulation he was not required to advise the lessee *before* the 20-year anniversary date of the particular readjustments to be made, in the instant case FMC nonetheless advised of the readjustments, including the increase of the royalty rate to the statutory

⁷ The Secretary has promulgated regulations covering coal lease readjustments. These regulations require notice of intent to readjust prior to the anniversary date but then allow for two years in which to finalize the terms. 43 C.F.R. § 3451.1(c) (1986). Prior to being finalized, the Secretary published regulations calling for notice of intent on or before the readjustment date. 44 Fed. Reg. 16832-33 (1979). Although many comments were received, not one suggested that the BLM must complete the readjustment prior to the anniversary date of the lease.

minimum set forth in FCLAA (1976), on December 22, 1982, 68 days before the March 1, 1983, anniversary date. In connection with the timeliness issue, both FMC and the Secretary rely on *Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949 (10th Cir. 1982).

The coal lease in *Rosebud* was entered into on April 5, 1935, and, under MLLA (1920) and the terms of the lease, was subject to readjustment by the Secretary at the end of each succeeding 20-year period. Accordingly, the end of the second 20-year period occurred on April 5, 1975. In *Rosebud*, there was no notice of any sort sent the coal company by any representative of the Department of the Interior until October 4, 1977, two and one-half years after the expiration of the second 20-year period. On this latter date a notice was sent the coal company by the Department advising the former that the terms and conditions of the existing lease were going to be readjusted to conform with the requirements of FCLAA (1976). The IBLA held that there could be a readjustment of the terms and conditions of Rosebud's lease at a time over two and one-half years after the anniversary date of the lease. *California Portland Cement Co., Rosebud Coal Sales Co.*, 40 IBLA 339 (1979). Rosebud sought judicial review of that administrative decision. The United States District Court for the District of Wyoming held that the lease could not be readjusted two and one-half years after the anniversary date of the lease and reversed the IBLA's decision.

On appeal, in *Rosebud*, we affirmed the district court, stating that the issue was a "narrow one", i.e., "whether by a notice given about two and one-half years after the anniversary date the Department has authority to exercise a right given it under the Mineral Leasing Act to readjust the terms of the coal lease." 667 F.2d at 950. Our answer in *Rosebud* to that narrow issue was that -- such notice did not give the Department authority to

readjust. In so holding, we stated that MLLA (1920) and the lease provisions "provide a right to the government in the nature of an option to make adjustments it considers necessary or to let the opportunity pass." *Id.* at 951. Further, we indicated quite clearly that this option must be exercised in timely fashion, or it is waived by inaction, and that an attempt two and one-half years after the anniversary date to serve notice on the Coal Company of an intent to readjust is not timely. In our view, *Rosebud* strongly suggests that a notice of an intent to readjust terms and conditions of a coal lease given a coal company on or shortly before the 20-year anniversary date preserves the Department's right under MLLA and the lease provisions to readjust the terms within a reasonable time thereafter, and we now so hold.⁸

No. 84-2175

The district court, after holding that the Secretary's readjustment of the royalty rate in FMC's two leases

⁸ In *Rosebud*, notice that there would be readjustments in the terms and conditions of the lease was given the company on October 4 1977, two and one-half years after the 20-year anniversary date. On November 28, 1977, *Rosebud* was given the readjusted terms. *Rosebud* filed objections which were subsequently overruled by the BLM. The decision of the IBLA upholding the ruling of BLM occurred on May 10, 1979 (40 IBLA 339). On judicial review, the focus of the district court, and of this court on appeal, was exclusively on the *date* of notice, and the *date* of final action by BLM was not mentioned, let alone relied on, by either the district court or this court. Rather, as stated, both the district court and this court were concerned only with the *date* of the notice of intent to readjust.

Option contracts are usually exercised by giving notice of acceptance. *Restatement (Second) of Contracts*, § 63, comment f (1979); A. Corbin, 1A *Corbin on Contracts*, § 264 (1963). Although time is of the essence in accepting the option; once a timely acceptance is made, additional time may be allowed to perform the terms of the option. *Id.*, § 273 at 600. Hence once the Department has exercised its option to readjust in a timely fashion, it has a reasonable time thereafter in which to set the terms of the lease.

to 12½% of the value of the coal was timely, thereafter held that the readjustment was improper. The Secretary appeals from that part of the district court's judgment. In essence, the district court held that section 6 of FCLAA (1976) did not apply to leases *pre-existing* FCLAA (1976) even where the anniversary date of the lease was *subsequent* to FCLAA (1976) and that, such being the case, by the terms of FMC's leases any readjustment must be "reasonable" and "should only be altered upon a complete evaluation of all the factors involved in an individual case." We are not in accord with this reasoning or the result reached by the district court.

Section 7 of MILLA (1920), set forth above in footnote 2, provides, in effect, that a lease shall be for an indeterminate period at a specified royalty rate, fixed by the Secretary, of not less than five cents per ton, subject to the further condition that at the end of each 20-year period "such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the expiration of such periods." The leases at issue incorporated this language reserving in the lessor the right to readjust terms and conditions "unless otherwise provided by law." The quoted language in MLLA (1920) incorporated into the leases is of particular importance. To us it quite clearly means that at the end of a 20-year period the Secretary may fix, *inter alia*, such a new royalty rate as he, or she, may determine is proper, unless law in effect at the expiration of such 20-year period provides differently.⁹

⁹ We do not interpret the language in MLLA (1920), which was incorporated verbatim in the two leases here involved, as only meaning that the Secretary on an anniversary date may readjust unless the law in effect at the time of readjustment has taken that right away. It no doubt covers that possibility. But in our view it also permits Congress to allow the Secretary to continue to have the right to readjust, but at the same time circumscribe that right by enacting, for example, a revised minimum royalty rate. The power to do the greater includes the power to do the lesser.

Applied to the present case, such means that the Secretary on the anniversary date of FMC's leases could increase the royalty rate as he deemed proper, subject, however, to any statutory law in effect on such anniversary date. And statutory law in effect on FMC's anniversary date provided, in essence, that though the Secretary could, as before, change the previously existing royalty rate to one he determined to be proper, the adjusted new rate could not be less than $12\frac{1}{2}\%$ of the value of the coal. 30 U.S.C. § 207 (1982). Stated differently, MLLA (1920) had a minimum royalty rate of five cents per ton of coal, and FCLAA (1976) raised the minimum royalty rate to $12\frac{1}{2}\%$ of the value of the coal.¹⁰ Admittedly, this is a drastic increase in royalty rate, but such is a matter for Congress. Further, and importantly, we find nothing in our reading of FCLAA (1976), or in its legislative history, to indicate that FCLAA (1976) was not to be applied to pre-FCLAA coal leases on their post-FCLAA anniversary date.¹¹

¹⁰ FMC contends applying FCLAA's terms at readjustment of a pre-FCLAA leases constitutes a retroactive application of the statute. In *Rosebud* we noted that FCLAA was not intended to be retroactive. 667 F.2d at 952. While we continue to adhere to that belief, we are not persuaded that the statute was applied retroactively in this case. In *Rosebud* the lease at issue came due for readjustment over a year before FCLAA was passed by Congress. In contrast FMC's leases could only be readjusted as of March 1, 1983, over six years *after* FCLAA amended the MLLA (1920). The Secretary clearly had the right to set new terms on the readjustment date and it is not a retroactive application of FCLAA to set the new terms in accordance with existing law.

¹¹ To the contrary, there is evidence that FCLAA terms were meant to apply on post-FCLAA readjustments. Specifically when Congress amended portions of FCLAA in 1978 it was aware of Interior's interpretation that FCLAA terms were to be applied at the time of readjustment. See S.Rep. No. 1169, 95th Cong., 2d Sess. 7 (1978) (In discussing the 1978 modification of FCLAA's § 3, the report noted that "all leases of course would be subject to the provisions of the 1976 amendments at the expiration of their original lease terms."); see also *Coal Leasing Amendments*, Hear-

As stated, FMC's leases generally tracked the language of MLLA (1920) with the addition, however, of the word "reasonably", i.e., the lessors' "right reasonably to readjust." However, we do not regard the use of the word "reasonably" to alter the present situation, since the leases themselves used the additional statutory language "unless otherwise provided by law at the expiration of any such period." And, as indicated, the law as of March 1, 1983, did "otherwise provide."¹²

In sum, on the readjusted royalty rate issue, we believe the result reached gives effect to the plain meaning of the applicable statutes, which is of course controlling, and at the same time squares with the language used in the leases themselves.

Judgment affirmed in part and reversed in part, and case remanded for further proceedings consonant with this opinion.

ings on S3189, Before the Subcommittee on Energy Production and Supply, 95th Cong., 2d Sess. 15 (1978) (statement of Guy Martin, Assistant Secretary of Interior); Letter from Department of Interior, Solicitor's Office, to Senator Jackson (Sept. 12, 1978). Congress' failure to alter this interpretation while amending the statute in other respects indicates that legislative intent has been correctly discerned. *Commodity Futures Trading C'mmn v. Schor*, — U.S. —, 106 S.Ct. 3245, 3255, 92 L.Ed.2d 675 (1986); *North Haven Board of Education v. Bell*, 456 U.S. 512, 535, 102 S.Ct. 1912, 1925, 72 L.Ed.2d 299 (1982).

¹² FMC argues it is at least entitled to an individualized evaluation of its lease at readjustment. However, as the Secretary was directed by law to raise the royalty rate to at least 12½% of the value of the coal mined, and individualized evaluation could not have produced any result more favorable to FMC. Further Interior does allow objections to be filed and also provides a process by which they may be considered. See 43 C.F.R. § 3452.1-1(d). In addition Congress has provided for individualized rate relief in § 39 when necessary to promote development or to allow the leases to be successfully operated. 30 U.S.C. § 209 (1982). FMC has not yet applied for this relief.

APPENDIX B

UNITED STATES DISTRICT COURT
D. WYOMING

No. C83-347-K

FMC WYOMING CORPORATION,
Plaintiff,
v.

JAMES G. WATT, as Secretary of the United States Department of the Interior; ROBERT F. BURFORD, as Director of the Bureau of Land Management, United States Department of the Interior; JIM H. TAYLOR, as Chief, Branch of Solid Minerals, Wyoming State Office Bureau of Land Management; MARLA B. BOHL, as former Chief, Land and Mining, Wyoming State Office, Bureau of Land Management; HAROLD G. STINCHCOMB, as former Chief, Branch of Energy Minerals, Wyoming State BLM Office; J. STAN MCKEE, as former Acting Chief, Branch of Solid Minerals, Wyoming State BLM Office; and the UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

June 29, 1984

Marilyn S. Kite, Holland & Hart, Cheyenne, Wyo., for plaintiff.

Richard A. Stacy, U.S. Atty., for the District of Wyoming, Cheyenne, Wyo., and Lyle K. Rising, Dept. of the Interior, Denver, Colo., for defendants.

ORDER REVERSING DECISION OF
INTERIOR BOARD OF LAND APPEALS
WITH FINDINGS

KERR, District Judge.

The above-entitled matter having come on regularly for hearing before the Court upon cross motions for summary judgment and upon request for judicial review of the decision of the Interior Board of Land Appeals (IBLA), plaintiff appearing by and through its attorney, Marilyn S. Kite, and the federal defendants appearing by and through their attorneys, Richard A. Stacy and Lyle K. Rising, and the Court having heard the arguments of counsel in support of and in opposition to said motions and having carefully considered the memoranda on file herein and being fully advised in the premises, FINDS as follows:

This matter was originally brought before this Court as an appeal from the IBLA affirmance of a BLM decision which held (1) that notice of readjustment given on or before the 20 year anniversary of the lease was sufficient for timely readjustment under the statute, and (2) that the 12½% royalty rate named in the Federal Coal Leasing Amendments Act of 1976 (FCLAA) was mandatory upon readjustment of pre-existing leases. The relevant facts are as follows:

The United States, through defendant Secretary, issued two federal coal leases to plaintiff on March 1, 1963. The royalty rate fixed in the leases was 17½ cents per ton for strip mined coal. The United States expressly reserved the "right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof." The leases were also subject to the Mineral Lands Leasing Act of 1920 (MLLA) and all reasonable regulations of the Secretary then in force.

Plaintiff opened the Skull Point Mine near Kemmerer, Wyoming, making substantial investment in the development and production of the coal therein. The mine has been classified as a special bituminous coal mine wherein the cost of extracting the coal increases over the life of the mine due to dipping coal seams. Under that classification the mine is exempt from certain reclamation standards under the Surface Mining Control and Reclamation Act. Only one other mine is so classified in the entire United States—the Pittsburgh and Midway Mine neighboring plaintiff's Skull Point Mine. Plaintiff's royalty was readjusted in April 1983. The anniversary date allowing readjustment of the Pittsburgh and Midway lease does not occur until 1998.

In 1976, Section 7 of the MLLA of 1920 which was applicable to plaintiff, was amended to read as follows:

Sec. 7 (a) A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

March 1, 1983 was the 20 year anniversary date of plaintiff's lease whereupon the leases could be readjusted.

Plaintiff was notified on August 23, 1982 that BLM intended to readjust the leases and then was notified by BLM on December 22, 1982 of the proposed terms and conditions of the readjustment. Plaintiff objected to the proposed terms of the readjustment on February 11, 1983. The BLM's response to objections and finalization of the readjustment terms (which still included the 12½% royalty rate) were contained in a decision dated April 6, 1983. Plaintiff claims that readjustment was untimely and is, therefore, barred.

Prior to the FCLAA, the terms of leases subject to readjustment were readjusted on an individual basis. An evaluation was made on the specific facts of each mining operation. Plaintiff presented a factual statement to the BLM and to the IBLA outlining their situation which they contended made the 12½% royalty unreasonable. No hearing was held on the matter. BLM, affirmed by the IBLA, determined that the 12½% royalty rate was absolute and mandatory upon readjustment of pre-FCLAA leases. Plaintiff contends that such a readjustment is arbitrary, capricious and an abuse of discretion.

Both parties rely on the case of *Rosebud Coal Sales Co. v. Andrus*, No. C79-160B (D.Wyo. June 10, 1980), which case was appealed and affirmed in the Tenth Circuit, *Rosebud Coal Sales Co. v. Andrus*, 667 F.2d 949 (10th Cir. 1982). This Court has made a careful reading of the case, on both levels. As for the untimely readjustment, this Court finds the *Rosebud* case dispositive and concludes that readjustment was *not* untimely in the present case. In the *Rosebud* case the anniversary date of readjustment was April 5, 1975. Notice of Intent to Readjust was not given until October 4, 1977. Both the district court and the Tenth Circuit Court of Appeals found that such readjustment was untimely and thereby barred. However, both courts also indicate that it is notice of intent to readjust that must be given prior to the anniversary date. The district court stated:

Rosebud did nothing here that would have prevented the United States from giving it notice prior to the twenty year anniversary date that the United States intended to readjust the terms of the lease. (citations omitted) *Rosebud*, C79-160B *supra* at 10.

.

On October 4, 1977 the plaintiff was sent a notice that the Department intended to readjust the lease terms. No excuse was offered to show why that simple notice couldn't have been given as easily on April 4, 1975, prior to the end of the term. *Id.*

.

The failure to provide the plaintiff any type of notice prior to the twenty year anniversary date does not evidence good faith performance of the express terms of its contract by the government. . . . *Id.* at 10, 11.

.

The government could easily have notified Rosebud on April 5, 1975 at least that it intended to readjust the terms of its lease. *Id.* at 14.

The Tenth Circuit Court of Appeals agreed with the district court, affirmed its decision, and stated:

The Government made no showing that the giving of notice at or before the anniversary date was not 'feasible.' 667 F.2d at 953.

.

The failure to give notice in 1975 without a reason to demonstrate it was not 'feasible' must constitute a failure by the Department to follow its own regulations had an adjustment been contemplated. *Id.*

It is clear from the ruling in *Rosebud* and the explanations set forth by the courts therein, that notice prior to the anniversary date made readjustment in the present case timely.

However, the second issue for consideration is whether BLM and IBLA were arbitrary and capricious in mandatorily applying the 12½% royalty rate to the leases in question, without consideration of plaintiff's specific fact situation. This Court finds that such application of the 12½% royalty rate is arbitrary, capricious, and an abuse of discretion.

Defendants contend that the amendment to Section 7 (cited above) which provides: "A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal is defined by regulation" requires that the 12½% royalty rate be applied, not only to new leases as of the amendment date, but also mandatorily to pre-existing leases upon readjustment. This is a change from the method of readjustment applied to leases prior to the 1976 amendment, which method provided for an evidentiary basis, an individual analysis of the lease subject to readjustment. There is no indication in any part of the amendment that the method of readjustment is to be altered. Presumably, new leases, subject to the 12½% royalty will be reviewed on their factual bases when the readjustment period comes due. To impose a new royalty rate at a 1000% increase without any type of factual analysis or consideration is not only arbitrary, it also defies the notion of equity. The leases in this case, and all leases issued prior to the 1976 amendment had a minimum royalty rate set. At the time of readjustment, that rate can be altered, but it can and should only be altered upon a complete evaluation of all the factors involved in an individual case. For example, one factor which should be considered in the present matter is the existence of a competitive bituminous coal mine which is not subject to readjustment and, therefore, the allegedly mandatory 12½% royalty rate could not be applied until 1998. A second factor is the very nature of plaintiff's mine, which presumably will be forced to produce less

coal as a 12½% royalty rate contributes to making the costs of mining prohibitive.

It should not be overlooked that the leases provided for "reasonable" readjustment. It appears to this Court that a readjustment increasing the royalty rate over 1000%, which is based only upon mandatory application of a statutory minimum to pre-existing leases, without any consideration of facts involved in the individual leases is far from reasonable.

The *Rosebud* case, discussed earlier and cited by both parties, makes some reference to this issue, supportive of this Court's position. From the district court opinion:

The record fails to support the imposition of a royalty of 12½%. No individual economic analysis of this lease was made. C79-160B, slip op. at 15.

.

No evidentiary basis was provided for the royalty rate established by the regulation. *Id.* at 16.

Some mention is made by the parties concerning retroactivity. Plaintiff contends that the 1976 12½% royalty rate cannot be retroactively applied to old leases upon readjustment. Defendants contend that applying the new royalty rate to readjustments which occur *after* the 1976 amendment is *not* retroactive application. The Tenth Circuit Court of Appeals in the *Rosebud* case stated:

The Section 7 amendment provided for a primary term and also for the royalty to be not less than 12.5%. There is no suggestion whatever that the amendment was to be retroactive and the contrary is indicated. 667 F.2d at 952.

This Court is of the opinion that mandatory application of the 12½% royalty rate to pre-existing leases, without a factual evaluation, is retroactive application of the provision, which everyone concedes was not intended and is not proper. The readjustment of existing leases

is not a new event, rather it is an ongoing part of the original lease. To mandatorily apply a minimum royalty rate of $12\frac{1}{2}\%$ is in essence to alter the original lease issued on March 1, 1963 with a $17\frac{1}{2}$ cent royalty rate imposed under a statutorily minimum royalty rate of 5 cents per ton. That 5 cents royalty rate was, of course, only a statutory minimum, subject to the terms of the lease itself as well as the readjustment process, normally occurring after a case-by-case factual evaluation. Now defendants attempt to change the method of readjustment *and* the minimum royalty rate is a change of the original lease and thereby a retroactive application of the 1976 amendment.

Finally, the Court notes that defendants argue that plaintiff has not exhausted its administrative remedies in that it has not applied for a royalty reduction under 30 U.S.C. § 209. That provision provides:

The Secretary of the Interior, for the purpose of encouraging the greatest ultimate recovery of coal, oil, gas, oil shale * * * and in the interest of conservation of natural resources, is authorized to waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on an entire leasehold, or on any tract or portion thereof segregated for royalty purposes, whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein. * * *.

However, the Department of Interior in its interpretation of this provision shows an intent for sparing use (if at all), only upon a showing of hardship and for a temporary period of time (there is some indication no reduction could exceed three years). 44 Fed.Reg. 42607 (1969); 87 I.D. 69 (Dec. 11, 1979). Even were the royalty reduced in plaintiff's case under this provision, it

would not be a solution to plaintiff's problems with the lease readjustment. Furthermore, a temporary reduction of the royalty rate is no substitute for a reasonable readjustment. Were the readjustment properly based on the individual factors in plaintiff's case, it is likely that a request for reduction under 30 U.S.C. § 209 would be unnecessary.

In summary, while the readjustment process was timely in the present case, the 12½% royalty rate was imposed arbitrarily and capriciously. Before readjustment can be completed, the BLM must make careful consideration of the facts and circumstances involved in, and especially those specific to plaintiff's leases. The royalty rate readjustment must be reasonable in light of those facts and circumstances. The 12½% royalty rate, though now a statutory minimum, cannot be flatly and mandatorily imposed on pre-existing leases at the time of readjustment.

For the above-stated reasons,

NOW, THEREFORE, IT IS

ORDERED that the decision of the IBLA be, and the same is, hereby reversed and the matter is remanded for proceedings consistent with this opinion.

APPENDIX C

[LOGO]

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

FMC CORP.

IBLA 83-594

Dated July 29, 1983

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, dismissing a protest regarding readjustment of coal leases, W-061421 and W-061422.

Affirmed.

APPEARANCES: Marilyn S. Kite, Esq., Carol A. Statkus, Esq., Cheyenne, Wyoming, and John F. Shepherd, Esq., Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

FMC Corporation (FMC) appeals an April 6, 1983, decision of the Wyoming State Office, Bureau of Land Management (BLM), dismissing FMC's objections to BLM's proposed readjustment of coal leases W-061421 and W-061422.

The two leases were issued to FMC on March 1, 1963, pursuant to the Mineral Leasing Act of 1920. Under section 3(d) of both leases, the United States reserved the right to readjust royalties and other terms and conditions at the end of 20 years from the date of the lease. BLM informed FMC of its proposed readjustment of the two leases in a notice dated August 23, 1982. In a notice dated December 22, 1982, BLM presented the pro-

posed terms and conditions to FMC and informed it that the readjustment would be effective March 1, 1983, the anniversary date of the lease. On February 11, 1983, appellant filed a protest with BLM objecting to the proposed increase of the production royalty and the advance royalty requirement. BLM dismissed the protest in a decision dated April 6, 1983, addressing each objection presented by appellant.¹

¹ The following are FMC's points of objections and BLM's responses to those points as contained in the Apr. 6, 1983, decision.

"*Objection 1*: 'Nonapplicability of FCLAA to existing leases.'

"*Response*: Leases issued prior to August 4, 1976, subject to readjustment after August 4, 1976, must be readjusted to include mandatory terms and conditions of the FCLAA. See *Solicitor's Opinion M-36939*, 88 I.D. 1003 (1981) and *Coastal States Energy Co.*, 70 IBLA 386 (1983).

"*Objection 2*: 'FMC is only subject to regulations in force at the time of execution of the lease.'

"*Response*: Current regulations promulgated to implement the FCLAA must be imposed on pre-FCLAA leases readjusted after August 4, 1976.

"*Objection 3*: 'Readjustment must be reasonable.'

"*Response*: The new royalty rates imposed in the readjusted leases conform to the mandatory royalty rates as set out in FCLAA.

"*Objection 4*: 'The proposed production royalty increase is an unconstitutional taking of property without compensation.'

"*Response*: The question of constitutionality is not properly one the Bureau or the Department may rule on. (*Madison D. Locke*, 65 IBLA 122 (1982)).

"*Objection 5*: 'The 12½ percent production royalty fails to consider the unique nature of FMC's special bituminous coal mine.'

"*Response*: The 12½ percent royalty is mandatory and prescribed by the FCLAA. Relief from the mandatory royalty rate is provided a lessee through a separate petition process pursuant to 30 U.S.C. 209 and regulations in 43 CFR 3473.3-2(d) and 30 CFR Part 211.

"*Objection 6*: 'The proposed readjustment of the royalty rate will place the FMC Skull Point operation at a competitive disadvantage.'

[Continued]

FMC filed its appeal of BLM's decision to dismiss its protest on May 4, 1983, and asserts in its statement of reasons the following reasons for its appeal of the BLM decision:

1. The proposed 12.5% production royalty violates the terms of the leases, which bind the United States as lessor to reasonable royalty rates.

2. The automatic imposition of a 12.5% royalty rate upon readjustment without any factual evaluation to determine an appropriate and reasonable royalty for FMC's mining operations, is arbitrary, capricious, and an abuse of discretion.

3. The 12.5% statutory minimum royalty, established by the FCLAA [Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1976)] for new leases issued on and after August 4, 1976, is not mandatory upon readjustment of pre-FCLAA leases.

¹ [Continued]

Response: The royalty rates imposed in readjustment of your leases are mandatory. Our failure to timely readjust adjacent leases in no way affects the readjustment of your leases. To not readjust your leases would be a dereliction of our duty in administering Federal Coal leases and in assuring a fair return to the United States.

Objection 7: 'Extreme increases in production royalty are inflationary.'

Response: The response to objection 3 above applies to this objection.

Objection 8: 'FMC objections to the payment of advance royalties on the Federal coal leases which are part of this ongoing operation. If an advance royalty is in fact imposed, it should be clarified that the intent of Section 7 is to credit all advance royalties paid, with no maximum limit, against production royalties incurred.'

Response: Advance royalty provisions are mandatory terms prescribed by FCLAA. Section 7 states that payment of advance royalties in lieu of continued operations will be consistent with regulations in 43 CFR 3473 and 30 CFR 211. We feel that Section 7 with references to applicable regulations is sufficient."

4. FMC's leases are subject only to regulations in force at the time they were executed; therefore, post-FCLAA regulations setting a 12.5% minimum royalty are inapplicable.

5. Lease provisions governing royalties for underground and strip mines do not apply to special bituminous coal mines.

6. Failure to complete readjustment of the leases at the end of the initial 20-year period is contrary to statutory authority and the terms of the leases.

7. The proposed advance royalty requirement is ambiguous and should be clarified.^[2]

At the time each lease was issued, section 7 of the Mineral Leasing Act of 1920, 30 U.S.C. § 207 (1970) provided:

Leases shall be for indeterminate periods upon condition * * * that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods.

Section 7 was amended by section 6 of FCLAA to read in pertinent part as follows: "Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of such ten-year period thereafter if the lease is extended." 30 U.S.C. § 207(a) (1976).

² BLM has not declared what royalty rate FMC's operation will be assessed under the readjusted lease. Despite its arguments that its operation is neither an underground nor strip mine, FMC assumes and therefore argues that the 12½ percent minimum royalty pertinent to strip mine operations will be assessed.

FCM asserts that FCLAA and its pertinent regulations are not applicable to pre-FCLAA leases and that imposition of the 12½ percent production royalty violates the terms of the lease. In support of its assertions, FCM argues that FCLAA is silent on readjustment of existing leases and that the express terms of the lease limit the right of readjustment to the imposition of reasonable terms and conditions. It charges that it has been deprived of the benefits of the bargain it has made.

Where readjusted lease terms or conditions are addressed by statute or regulation, BLM is required to impose those terms and conditions. Likewise, this Board must apply those provisions imposed by law, and we are without authority to waive or disregard legal obligations merely because a lessee challenges their imposition in the administrative appeals process. *Coastal States Energy Co.*, 70 IBLA 386, 391 (1983)³; *Lone Star Steel Co.*, 65 IBLA 147, 150 (1982).

FCLAA amended the Mineral Leasing Act to require new mandatory lease terms, most notably the minimum 12½ percent production royalty for surface mined coal and a 10-year production requirement. 30 U.S.C. § 207 (1976). The 12½ percent minimum royalty rate is by its terms absolute. FCM contends that, based on legislative history and statutory interpretation, FCLAA does not apply to coal leases issued prior to enactment (August 4, 1976) of that Act. That issue was addressed in *Solicitor's Opinion*, M-36939, 88 I.D. 1003 (1981). Therein, the Solicitor concluded that "when the Secretary readjusts a pre-FCLAA lease he must do so in conformity with the [Mineral Leasing Act] as amended." *Id.* at 1004 (emphasis added). That conclusion has been applied by the Board in *Gulf Oil Corp.*, 73 IBLA 328

³ Appeal pending, *Coastal States Energy Co. v. Watt*, No. C83-0730J (D. Utah filed June 1, 1983).

(1983), *Coastal States Energy Co., supra, Blackhawk Coal Co.*, 68 IBLA 96 (1982), and *Lone Star Steel Co., supra.*

FCLAA certainly cannot alter leases issued prior to its enactment before those leases become subject to readjustment. But FCLAA does affect conduct, events, and circumstances which occur after its enactment. The lessee of a pre-FCLAA lease has no vested rights to the indefinite continuation of existing lease terms, since all the terms and conditions were prescribed subject to periodic readjustment. *Solicitor's Opinion, supra* at 1008.

We also reject FCM's assertion that it is somehow insulated from regulations promulgated pursuant to FCLAA and in effect at the time of readjustment (43 CFR 3541.1 (1982))⁴ because of general provisions of its leases relating to regulations "in force at date hereof." That general lease language cannot serve to negate the statutory authority of the Secretary to readjust lease terms and conditions. Regulations in effect at the time of readjustment are applicable to leases subject to readjustment. Just as the statute authorizes readjustment of terms and conditions, so too may the procedures for implementation be adjusted. *Coastal States Energy Co., supra.* Those procedures were revised pursuant to FCLAA. We find no ban to applying those regulations to readjustment of these leases.

Thus, the readjustment of the leases to include an increase in production royalty to 12½ percent is required by both statute and regulation. Because the Board must adhere to statutory and regulatory authority, de-

⁴ 43 CFR 3451.1(a)(2) reads: "Any lease subject to readjustment which contains a royalty rate less than the minimum royalty prescribed in § 3473.3-2 of this title shall be readjusted to conform to the minimum prescribed in that section." 43 CFR 3473.3-2(a)(2) establishes that "[a] lease shall require payment of royalty of not less than 12½ percent of the value of the coal removed from a surface mine."

cisions by BLM properly applying statutory or regulatory requirements will be affirmed on appeal.

FMC asserts that BLM failed to recognize the unique nature of its special bituminous coal mine and that the lease provisions governing royalties is inapplicable to such a mine. FCM refers to special relief afforded special bituminous coal mines under section 527 of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1277 (Supp. V 1981). However, that statutory provision is directed towards providing authority in the Department to adjust several environmental standards. 1977 U.S. Code Cong. & Ad. News 593, 659. Such authority does not address royalty payments. As pointed out to FMC in BLM's decision, if special circumstances warrant relief from imposition of the royalty rate established by BLM, such relief is to be sought pursuant to 43 CFR 3473.3-2 (d) and 30 CFR 211.63(c).⁵

FCM questions the timeliness in readjusting these leases, stating that readjustment was not completed until "weeks after the March 1, 1983 deadline," and argues

⁵ 30 CFR 211.63(c)(1) (47 FR 33179, 33191 (July 30, 1982)) provides:

"The District Mining Supervisor may waive, suspend, or reduce the rental on a Federal lease, or reduce the Federal royalty, but not advance royalty, on a Federal lease or portion thereof. The District Mining Supervisor shall take such action for the purpose of encouraging the greatest ultimate recovery of Federal coal, and in the interest of conservation of Federal coal and other resources, whenever in his judgment it is necessary to promote development, or if he finds that the Federal lease cannot be successfully operated under its terms. In no case shall the District Mining Supervisor reduce to zero any royalty on a producing Federal lease." See also 43 CFR 3473.3-2(d).

The record indicates that FMC filed a detailed letter with BLM on June 2, 1983, discussing the uniqueness of its situation. Although this letter is not framed as an application under 30 CFR 211.63(c)(1), FMC's circumstances as presented therein may be sufficient to merit the requested relief if an application is filed.

that such readjustment was outside statutory authority and contrary to the terms of the lease. However, FMC incorrectly interprets the readjustment process and improperly compares BLM's actions with those requirements.

BLM's initial notice to FMC that the leases were to be readjusted was dated August 3, 1982. The proposed terms and conditions were received by FMC on December 27, 1982, with the announcement that those terms and conditions were to be effective March 1, 1983. In its notice, BLM also informed FMC of an opportunity to file within 60 days objections to the proposed terms and conditions. FMC filed its objections. However, such filing of objections did not alter the effective date of the readjustment. 43 CFR 3451.2(b). BLM informed FMC of that fact in the notice.

We find that where administration of new terms and conditions is postponed pending review of a lessee's objections concerning the imposition of such new terms and conditions, such practice is not inconsistent with statutory requirements for readjustment. This Board has held that notice of intent to readjust is all that is necessary on or prior to the anniversary of the lease and that such policy is consistent with *Rosebud Coal Sales Co. v. Andrus*, 667 F.2d 949 (10th Cir. 1982), which FMC significantly relies upon. See *Coastal States Energy Co.*, *supra*. In this case not only was the required notice given, but the specific terms and conditions for readjustment were also provided and scheduled to become effective prior to the end of the 20-year period. BLM's readjustment of the terms and conditions was timely and in accordance with the statutory and regulatory requirements.

Finally, FMC alleges that section 7 of the readjusted lease, governing advance royalty payment, is ambiguous because it does not specify within the clause either the

minimum tonnage or the percent of value on which the advance royalty is to be based. FMC argues that imposition of an ambiguous requirement is arbitrary and capricious and requests that section 7 be reworded to eliminate such ambiguity. Section 7 of the readjusted lease reads:

Upon request by the lessee the District Mining Supervisor may accept, for a total of not more than 10 years, the payment of advance royalties in lieu of continued operation consistent with the regulations in 43 CFR 3473 and 30 CFR 211. The advance royalty shall be based on a percent of the value of a minimum number of tons which shall be determined in the manner established by the regulations in 30 CFR 211.

FMC charges that such reference to regulations does not express the conditions of the clause with clarity since the regulations are subject to change.

The opportunity afforded FMC to submit advance royalty in lieu of continued operation arises under statutory authority. "The Secretary of the Interior, upon determining that the public interest shall be served thereby, may suspend the condition of continued operation upon the payment of advance royalties." 30 U.S.C. § 207(b) (1976). Thus, the privilege to seek suspension of a lease obligation is not a right peculiar to the contract and subject to bargaining, but it is an opportunity made available by Congress and appears in the lease to implement the statute and regulations. See 30 CFR 211.63(c) (1) (47 FR 33179, 33191 (July 30, 1976)); 43 CFR 3473.3-2(b).

The applicable statute, 30 U.S.C. § 207(b) (1976), also provides that such advance royalty "shall be no less than the production royalty which would otherwise be paid and shall be computed on a fixed reserve to production ratio (determined by the Secretary)." That fixed ratio and

the advance royalty determination process are elaborated with clear meaning in 30 CFR 211.23 (47 FR 33179, 33188 (July 30, 1982)). Such duly promulgated regulations have the force and effect of law and are binding on the Department. See *Sam P. Jones*, 71 IBLA 42 (1983); *Altex Oil Corp.*, 61 IBLA 270 (1982).⁶ It is also generally accepted in contract law that independent elements of an agreement may be determined by a process set forth separate from the agreement and that where a writing refers to another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing. See 1 *Corbin on Contracts* § 95, 393 (1963); 4 *Williston on Contracts* § 628, 901-04 (3d. ed. 1961). This is particularly applicable in this situation, for BLM is governed by the statute and regulations in the manner in which it may grant the described relief. Accordingly, section 7 of the readjusted lease reflects BLM's balance between notification of the availability of a statutory opportunity and its duty to administer the public land in accordance with applicable statutes and regulations.

FMC requests the Board to address circumstances that may not occur during the term that the lease is effective. It is the usual policy of the Board to forego adjudication where no actual controversy exists and no cognizable interest has been adversely affected, avoiding advisory opinions based on hypothetical circumstances. See 43 CFR 4.410; *Hal V. Carlson, Jr.*, 62 IBLA 305 (1982). FMC may choose not to avail itself of the opportunity to petition for suspension of the continued operation requirement, the operating circumstances may never warrant application of the denoted relief, or the regulations may not be altered or amended prior to a petition under the lease clause. If new regulations are promulgated, the Department must adhere to proper administrative pro-

⁶ *Appeal dismissed, Altex Oil Corp. v. Watt*, No. 82-0424A (D. Utah Oct. 19, 1982) (*dismissed without prejudice*).

cedures found in 5 U.S.C. § 553 (1976), which afford interested parties the opportunity to become involved in the rulemaking process. Such guidelines and public involvement serve to negate the arbitrariness and capriciousness of which FMC complains. Without an allegation that it is totally erroneous, we hesitate to complicate an explicit, workable agreement which adheres to and applies the regulations.

BLM's reply to FMC's protest was cogent and well presented. FMC has not shown that any part thereof was erroneous.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

/s/ Edward W. Stuebing
EDWARD W. STUEBING
Administrative Judge

We concur:

/s/ Will A. Irwin
WILL A. IRWIN
Administrative Judge

/s/ James L. Burski
JAMES L. BURSKE
Administrative Judge

32a

APPENDIX D

EXHIBIT F

State Office
P.O. Box 1828
Cheyenne, Wyoming 32001

W-061421
W-061422
3400
(922-4)

April 6, 1983

CERTIFIED-RETURN RECEIPT REQUESTED

DECISION

FMC Corporation
Natural Resources Operation
Box 750
Kemmerer, Wyoming 83101

**OBJECTIONS TO READJUSTED TERMS AND
CONDITIONS DISMISSED**

Coal leases W-061421 and W-061422 were issued effective March 1, 1963, and were subject to readjustment on February 23, 1983. FMC Corporation was notified by decision of this office dated August 23, 1982, of our intention of readjusting the lease terms, a right expressly reserved by the lessor in Section 3(d) of the leases. Readjusted lease terms and conditions were forwarded to the lessee on December 22, 1982, to become effective March 1, 1983.

On February 11, 1983, FMC Corporation filed objections to the readjusted lease terms and conditions. The following are the points of objection and our response to those points:

Objection 1:

"Nonapplicability of FCLAA to existing leases."

Response:

Leases issued prior to August 4, 1976, subject to readjustment after August 4, 1976, must be readjusted to include mandatory terms and conditions of the FCLAA. See *Solicitor's Opinion* M-36939, 88 I.D. 1003 (1981) and *Coastal States Energy Co.*, 70 IBLA 386 (1983).

Objection 2:

"FMC is only subject to regulations in force at the time of execution of the lease."

Response:

Current regulations promulgated to implement the FCLAA must be imposed on pre-FCLAA leases readjusted after August 4, 1976.

Objection 3:

"Readjustment must be reasonable."

Response:

The new royalty rates imposed in the readjusted leases conform to the mandatory royalty rates as set out in FCLAA.

Objection 4:

"The proposed production royalty increase is an unconstitutional taking of property without compensation."

Response:

The question of constitutionality is not properly one the Bureau or the Department may rule on. (*Madison D. Locke*, 65 IBLA 122 (1982))

Objection 5:

"The 12½ percent production royalty fails to consider the unique nature of FMC's special bituminous coal mine.

Response:

The 12½ percent royalty is mandatory and prescribed by the FCLAA. Relief from the mandatory royalty rate is provided a lessee through a separate petition process pursuant to 30 U.S.C. 209 and regulations in 43 CFR 3473.3-2(d) and 30 CFR Part 211.

Objection 6:

"The proposed readjustment of the royalty rate will place the FMC Skull Point operation at a competitive disadvantage."

Response:

The royalty rates imposed in readjustment of your leases are mandatory. Our failure to timely readjust adjacent leases in no way affects the readjustment of your leases. To not readjust your leases would be a dereliction of our duty in administering Federal coal leases and in assuring a fair return to the United States.

Objection 7:

"Extreme increases in production royalty are inflationary."

Response:

The response to objection 3 above applies to this objection.

Objection 8:

"FMC objects to the payment of advance royalties on the Federal coal leases which are part of this

ongoing operation.—If an advance royalty is in fact imposed, it should be clarified that the intent of Section 7 is to credit all advance royalties paid, with no maximum limit, against production royalties incurred."

Response:

Advance royalty provisions are mandatory terms prescribed by FCLAA. Section 7 states that payment of advance royalties in lieu of continued operations will be consistent with regulations in 43 CFR 3473 and 30 CFR 211. We feel that Section 7 with references to applicable regulations is sufficient.

All objections filed by FMC Corporation are hereby dismissed for the reasons set out in the above responses.

The right of appeal to the Board of Land Appeals, Office of the Secretary, is allowed in accordance with the regulations in 43 CFR Part 4, Subpart E. However, if an appeal is to be taken, the Notice of Appeal must be filed in this office (not with the Board) so that the case file can be transmitted to the Board. To avoid summary dismissal of the appeal, there must be strict compliance with the regulations (see enclosed information sheet outlining procedures to be followed when filing an appeal). Please note that the Rules of Practice now require that you serve a copy of the Notice of Appeal, any Statement of Reasons, written arguments or briefs on the Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, P. O. Box 25007, Denver Federal Center, Denver, Colorado 80225 within 15 days of filing any document in connection with an appeal.

/s/ J. Stan McKee
J. STAN MCKEE
Acting Chief, Branch of
Solid Minerals

Enclosure
Appeal Information

cc:

Marilyn Kite, Holland & Hart, Suite 500, 2020 Carey
Ave. Cheyenne, WY 82001 Royalty Management Pro-
gram, P. O. Box 5760, Denver, Colorado 50217-5760
DMS, P. O. Box 1170, Rock Springs, Wyoming 82901
DM, Rock Springs
CM, Casper

JMoffitt:agl 4-6-83

APPENDIX E

PUBLIC LAW 94-377 [S. 391]; Aug. 4, 1976

FEDERAL COAL LEASING AMENDMENTS
ACT OF 1975*For Legislative History of Act, see p. 1943*

An Act to amend the Mineral Leasing Act of 1920, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Federal Coal Leasing Amendments Act of 1975".

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision of the Mineral Lands Leasing Act, the reference shall be considered to be made to a section or other provision of the Act of February 25, 1920, entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain" (41 Stat. 437).

SEC. 2. The first sentence of section 2(a) of the Mineral Lands Leasing Act (30 U.S.C. 201(a)) is amended to read as follows:

"(1) The Secretary of the Interior is authorized to divide any lands subject to this Act which have been classified for coal leasing into leasing tracts of such size as he finds appropriate and in the public interest and which will permit the mining of all coal which can be economically extracted in such tract and thereafter he shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands for leasing and shall award leases thereon by competitive bidding. No less than 50 per centum of the

total acreage offered for lease by the Secretary in any one year shall be leased under a system of deferred bonus payment. Upon default or cancellation of any coal lease for which bonus payments are due, any unpaid remainder of the bid shall be immediately payable to the United States. A reasonable number of leasing tracts shall be reserved and offered for lease in accordance with this section to public bodies, including Federal agencies, rural electric cooperatives, or nonprofit corporations controlled by any of such entities: *Provided*, That the coal so offered for lease shall be for use by such entity or entities in implementing a definite plan to produce energy for their own use or for sale to their members or customers (except for short-term sales to others). No bid shall be accepted which is less than the fair market value, as determined by the Secretary, of the coal subject to the lease. Prior to his determination of the fair market value of the coal subject to the lease, the Secretary shall give opportunity for and consideration to public comments on the fair market value. Nothing in this section shall be construed to require the Secretary to make public his judgment as to the fair market value of the coal to be leased, or the comments he receives thereon prior to the issuance of the lease.”.

SEC. 3. The last sentence of section 2(a) of the Mineral Lands Leasing Act (30 U.S.C. 201(a)) is amended to read as follows:

“(2) (A) The Secretary shall not issue a lease or leases under the terms of this Act to any person, association, corporation, or any subsidiary, affiliate, or persons controlled by or under common control with such persons, association, or corporation, where any such entity holds a lease or leases issued by the United States to coal deposits and has held such lease or leases for a period of ten years when such entity is not, except as provided for in section 7(b) of this Act, producing coal from the lease deposits in commercial quantities. In computing the ten-

year period referred to in the preceding sentence, periods of time prior to the date of enactment of the Federal Coal Leasing Amendments Act of 1975 shall not be counted.

“(B) Any lease proposal which permits surface coal mining within the boundaries of a National Forest which the Secretary proposes to issue under this Act shall be submitted to the Governor of each State within which the coal deposits subject to such lease are located. No such lease may be issued under this Act before the expiration of the sixty-day period beginning on the date of such submission. If any Governor to whom a proposed lease was submitted under this subparagraph objects to the issuance of such lease, such lease shall not be issued before the expiration of the six-month period beginning on the date the Secretary is notified by the Governor of such objection. During such six-month period, the Governor may submit to the Secretary a statement of reasons why such lease should not be issued and the Secretary shall, on the basis of such statement, reconsider the issuance of such lease.

“(3) (A) (i) No lease sale shall be held unless the lands containing the coal deposits have been included in a comprehensive land-use plan and such sale is compatible with such plan. The Secretary of the Interior shall prepare such land-use plans on lands under his responsibility where such plans have not been previously prepared. The Secretary of the Interior shall inform the Secretary of Agriculture of substantial development interest in coal leasing on lands within the National Forest System. Upon receipt of such notification from the Secretary of the Interior, the Secretary of Agriculture shall prepare a comprehensive land-use plan for such areas where such plans have not been previously prepared. The plan of the Secretary of Agriculture shall take into consideration the proposed coal development in these lands: *Provided*, That where the Secretary of the Interior finds that because of

non-Federal interest in the surface or because the coal resources are insufficient to justify the preparation costs of a Federal comprehensive land-use plan, the lease sale can be held if the lands containing the coal deposits have been included in either the comprehensive land-use plan prepared by the State within which the lands are located or a land use analysis prepared by the Secretary of the Interior.

“(ii) In preparing such land-use plans, the Secretary of the Interior or, in the case of lands within the National Forest System, the Secretary of Agriculture, or in the case of a finding by the Secretary of the Interior that because of non-Federal interests in the surface or insufficient Federal coal, no Federal comprehensive land-use plans can be appropriately prepared, the responsible State entity shall consult with appropriate State agencies and local governments and the general public and shall provide an opportunity for public hearing on proposed plans prior to their adoption, if requested by any person having an interest which is, or may be, adversely affected by the adoption of such plans.

“(iii) Leases covering lands the surface of which is under the jurisdiction of any Federal agency other than the Department of the Interior may be issued only upon consent of the other Federal agency and upon such conditions as it may prescribe with respect to the use and protection of the nonmineral interests in those lands.

“(B) Each land-use plan prepared by the Secretary (or in the case of lands within the National Forest System, the Secretary of Agriculture pursuant to subparagraph (A) (i)) shall include an assessment of the amount of coal deposits in such land, identifying the amount of such coal which is recoverable by deep mining operations and the amount of such coal which is recoverable by surface mining operations.

“(C) Prior to issuance of any coal lease, the Secretary shall consider effects which mining of the proposed lease

might have on an impacted community or area, including, but not limited to, impacts on the environment, on agricultural and other economic activities, and on public services. Prior to issuance of a lease, the Secretary shall evaluate and compare the effects of recovering coal by deep mining, by surface mining, and by any other method to determine which method or methods or sequence of methods achieves the maximum economic recovery of the coal within the proposed leasing tract. This evaluation and comparison by the Secretary shall be in writing but shall not prohibit the issuance of a lease; however, no mining operating plan shall be approved which is not found to achieve the maximum economic recovery of the coal within the tract. Public hearings in the area shall be held by the Secretary prior to the lease sale.

“(D) No lease sale shall be held until after the notice of the proposed offering for lease has been given once a week for three consecutive weeks in a newspaper of general circulation in the county in which the lands are situated in accordance with regulations prescribed by the Secretary.

“(E) Each coal lease shall contain provisions requiring compliance with the Federal Water Pollution Control Act (33 U.S.C. 1151-1175) and the Clean Air Act (42 U.S.C. 1857 and following).”.

SEC. 4. Subject to valid existing rights, section 2(b) of the Mineral Lands Leasing Act (30 U.S.C. 201(b)) is amended to read as follows:

“(b) (1) The Secretary may, under such regulations as he may prescribe, issue to any person an exploration license. No person may conduct coal exploration for commercial purposes for any coal on lands subject to this Act without such an exploration license. Each exploration license shall be for a term of not more than two years and shall be subject to a reasonable fee. An exploration license shall confer no right to a lease under

this Act. The issuance of exploration licenses shall not preclude the Secretary from issuing coal leases at such times and locations and to such persons as he deems appropriate. No exploration license will be issued for any land on which a coal lease has been issued. A separate exploration license will be required for exploration in each State. An application for an exploration license shall identify general areas and probable methods of exploration. Each exploration license shall contain such reasonable conditions as the Secretary may require, including conditions to insure the protection of the environment, and shall be subject to all applicable Federal, State, and local laws and regulations. Upon violation of any such conditions or laws the Secretary may revoke the exploration license.

“(2) A licensee may not cause substantial disturbance to the natural land surface. He may not remove any coal for sale but may remove a reasonable amount of coal from the lands subject to this Act included under his license for analysis and study. A licensee must comply with all applicable rules and regulations of the Federal agency having jurisdiction over the surface of the lands subject to this Act. Exploration licenses covering lands the surface of which is under the jurisdiction of any Federal agency other than the Department of the Interior may be issued only upon such conditions as it may prescribe with respect to the use and protection of the non-mineral interests in those lands.

“(3) The licensee shall furnish to the Secretary copies of all data (including, but not limited to, geological, geophysical, and core drilling analyses) obtained during such exploration. The Secretary shall maintain the confidentiality of all data so obtained until after the areas involved have been leased or until such time as he determines that making the data available to the public would not damage the competitive position of the licensee, whichever comes first.

"(4) Any person who willfully conducts coal exploration for commercial purposes on lands subject to this Act without an exploration license issued hereunder shall be subject to a fine of not more than \$1,000 for each day of violation. All data collected by said person on any Federal lands as a result of such violation shall be made immediately available to the Secretary, who shall make the data available to the public as soon as it is practicable. No penalty under this subsection shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation."

SEC. 5. (a) Subject to valid existing rights, subsections 2(c) and 2(d) of the Act of August 31, 1964 (78 Stat. 710; 30 U.S.C. 201-1) are hereby repealed.

(b) Section 2 of the Mineral Lands Leasing Act is amended by the addition to the following new subsection at the end thereof:

"(d) (1) The Secretary, upon determining that maximum economic recovery of the coal deposit or deposits is served thereby, may approve the consolidation of coal leases into a logical mining unit. Such consolidation may only take place after a public hearing, if requested by any person whose interest is or may be adversely affected. A logical mining unit is an area of land in which the coal resources can be developed in an efficient, economical, and orderly manner as a unit with due regard to conservation of coal reserves and other resources. A logical mining unit may consist of one or more Federal leaseholds, and may include intervening or adjacent lands in which the United States does not own the coal resources, but all the lands in a logical mining unit must be under the effective control of a single operator, be able to be developed and operated as a single operation and be contiguous.

"(2) After the Secretary has approved the establishment of a logical mining unit, any mining plan approved

for that unit must require such diligent development, operation, and production that the reserves of the entire unit will be mined within a period established by the Secretary which shall not be more than forty years.

“(3) In approving a logical mining unit, the Secretary may provide, among other things, that (i) diligent development, continuous operation, and production on any Federal lease or non-Federal land in the logical mining unit shall be construed as occurring on all Federal leases in that logical mining unit, and (ii) the rentals and royalties for all Federal leases in a logical mining unit may be combined, and advanced royalties paid for any lease within a logical mining unit may be credited against such combined royalties.

“(4) The Secretary may amend the provisions of any lease included in a logical mining unit so that mining under that lease will be consistent with the requirements imposed on that logical mining unit.

“(5) Leases issued before the date of enactment of this Act may be included with the consent of all lessees in such logical mining unit, and, if so included, shall be subject to the provisions of this section.

“(6) By regulation the Secretary may require a lessee under this Act to form a logical mining unit, and may provide for determination of participating acreage within a unit.

“(7) No logical mining unit shall be approved by the Secretary if the total acreage (both Federal and non-Federal) of the unit would exceed twenty-five thousand acres.

“(8) Nothing in this section shall be construed to waive the acreage limitations for coal leases contained in section 27(a) of the Mineral Lands Leasing Act (30 U.S.C. 184(a)).”.

SEC. 6. Section 7 of the Mineral Lands Leasing Act (30 U.S.C. 207) is amended to read as follows:

"SEC. 7. (a) A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than $12\frac{1}{2}$ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

"(b) Each lease shall be subject to the conditions of diligent development and continued operation of the mine or mines, except where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee. The Secretary of the Interior, upon determining that the public interest will be served thereby, may suspend the condition of continued operation upon the payment of advance royalties. Such advance royalties shall be no less than the production royalty which would otherwise be paid and shall be computed on a fixed reserve to production ratio (determined by the Secretary). The aggregate number of years during the period of any lease for which advance royalties may be accepted in lieu of the condition of continued operation shall not exceed ten. The amount of any production royalty paid for any year shall be reduced (but not below 0) by the amount of any advance royalties paid under such lease to the extent that such advance

royalties have not been used to reduce production royalties for a prior year. No advance royalty paid during the initial twenty-year term of a lease shall be used to reduce a production royalty after the twentieth year of a lease. The Secretary may, upon six months' notification to the lessee cease to accept advance royalties in lieu of the requirement of continued operation. Nothing in this subsection shall be construed to affect the requirement contained in the second sentence of subsection (a) relating to commencement of production at the end of ten years.

“(c) Prior to taking any action on a leasehold which might cause a significant disturbance of the environment, and not later than three years after a lease is issued, the lessee shall submit for the Secretary's approval an operation and reclamation plan. The Secretary shall approve or disapprove the plan or require that it be modified. Where the land involved is under the surface jurisdiction of another Federal agency, that other agency must consent to the terms of such approval.”.

SEC. 7. The Mineral Lands Leasing Act is amended by inserting after section 8 the following new section 8A:

“SEC. 8A. (a) The Secretary is authorized and directed to conduct a comprehensive exploratory program designed to obtain sufficient data and information to evaluate the extent, location, and potential for developing the known recoverable coal resources within the coal lands subject to this Act. This program shall be designed to obtain the resource information necessary for determining whether commercial quantities of coal are present and the geographical extent of the coal fields and for estimating the amount of such coal which is recoverable by deep mining operations and the amount of such coal which is recoverable by surface mining operations in order to provide a basis for—

“(1) developing a comprehensive land use plan pursuant to section 2;

“(2) improving the information regarding the value of public resources and revenues which should be expected from leasing;

“(3) increasing competition among producers of coal, or products derived from the conversion of coal, by providing data and information to all potential bidders equally and equitably;

“(4) providing the public with information on the nature of the coal deposits and the associated stratum and the value of the public resources being offered for sale; and

“(5) providing the basis for the assessment of the amount of coal deposits in those lands subject to this Act under subparagraph (B) of section 2(a)(3).

“(b) The Secretary, through the United States Geological Survey, is authorized to conduct seismic, geophysical, geochemical, or stratigraphic drilling, or to contract for or purchase the results of such exploratory activities from commercial or other sources which may be needed to implement the provisions of this section.

“(c) Nothing in this section shall limit any person from conducting exploratory geophysical surveys including seismic, geophysical, chemical surveys to the extent permitted by section 2(b). The information obtained from the exploratory drilling carried out by a person not under contract with the United States Government for such drilling prior to award of a lease shall be provided the confidentiality pursuant to subsection (d).

“(d) The Secretary shall make available to the public by appropriate means all data, information, maps, interpretations, and surveys which are obtained directly by the Department of the Interior or under a service con-

tract pursuant to subsection (b). The Secretary shall maintain a confidentiality of all proprietary data or information purchased from commercial sources while not under contract with the United States Government until after the areas involved have been leased.

“(e) All Federal departments or agencies are authorized and directed to provide the Secretary with any information or data that may be deemed necessary to assist the Secretary in implementing the exploratory program pursuant to this section. Proprietary information or data provided to the Secretary under the provisions of this subsection shall remain confidential for such period of time as agreed to by the head of the department or agency from whom the information is requested. In addition, the Secretary is authorized and directed to utilize the existing capabilities and resources of other Federal departments and agencies by appropriate agreement.

“(f) The Secretary is directed to prepare, publish, and keep current a series of detailed geological, and geophysical maps of, and reports concerning, all coal lands to be offered for leasing under this Act, based on data and information compiled pursuant to this section. Such maps and reports shall be prepared and revised at reasonable intervals beginning eighteen months after the date of enactment of this Act. Such maps and reports shall be made available on a continuing basis to any person on request.

“(g) Within six months after the date of enactment of this Act, the Secretary shall develop and transmit to Congress an implementation plan for the coal lands exploration program authorized by this section, including procedures for making the data and information available to the public pursuant to subsection (d), and maps and reports pursuant to subsection (f). The implementation plan shall include a projected schedule of exploratory activities and identification of the regions

and areas which will be explored under the coal lands exploration program during the first five years following the enactment of this section. In addition, the implementation plan shall include estimates of the appropriations and staffing required to implement the coal lands exploration program.

“(h) The stratigraphic drilling authorized in subsection (b) shall be carried out in such a manner as to obtain information pertaining to all recoverable reserves. For the purpose of complying with subsection (a), the Secretary shall require all those authorized to conduct stratigraphic drilling pursuant to subsection (b) to supply a statement of the results of test boring of core sampling including logs of the drill holes; the thickness of the coal seams found; an analysis of the chemical properties of such coal; and an analysis of the strata layers lying above all the seams of coal. All drilling activities shall be conducted using the best current technology and practices.”.

SEC. 8. The Mineral Lands Leasing Act is further amended by adding after section 8A the following new section 8B:

“SEC. 8B. Within six months after the end of each fiscal year, the Secretary shall submit to the Congress a report on the leasing and production of coal lands subject to this Act during such fiscal year; a summary of management, supervision, and enforcement activities; and recommendations to the Congress for improvements in management, environmental safeguards, and amount of production in leasing and mining operations on coal lands subject to this Act. Each submission shall also contain a report by the Attorney General of the United States on competition in the coal and energy industries, including an analysis of whether the antitrust provisions of this Act and the antitrust laws are effective in preserving or promoting competition in the coal or energy industry.”.

SEC. 9. (a) Section 35 of the Mineral Lands Leasing Act, as amended (30 U.S.C. 191) is further amended by deleting "52½ per centum thereof shall be paid into, reserved" and inserting in lieu thereof: "40 per centum thereof shall be paid into, reserved", and is further amended by striking the period at the end of the proviso and inserting in lieu thereof the following language: "*Provided further*, That an additional 12½ per centum of all moneys received from sales, bonuses, royalties, and rentals of public lands under the provisions of this Act and the Geothermal Steam Act of 1970 shall be paid by the Secretary of the Treasury as soon as practicable after December 31 and June 30 of each year to the State within the boundaries of which the leased lands or deposits are or were located; said additional 12½ per centum of all moneys paid to any State on or after January 1, 1976, shall be used by such State and its subdivisions as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this Act for (1) planning, (2) construction and maintenance of public facilities, and (3) provision of public services: *Provided further*, That such funds now held or to be received, by the States of Colorado and Utah separately from the Department of the Interior oil shale test leases known as 'C-A'; 'C-B'; 'U-A' and 'U-B' shall be used by such States and subdivisions as the legislature of each State may direct giving priority to those subdivisions socially or economically impacted by the development of minerals leased under this Act for (1) planning, (2) construction and maintenance of public facilities, and (3) provision of public services."

(b) In the first sentence of section 35 of the Mineral Lands Leasing Act, before the words "shall be paid into the Treasury of the United States" insert "and the

Geothermal Steam Act of 1970, notwithstanding the provisions of section 20 thereof,"; before the words "from lands within the naval petroleum reserves" insert "and the Geothermal Steam Act of 1970"; and, in the second sentence, before the words "not otherwise disposed of" insert "and the Geothermal Steam Act of 1970".

SEC. 10. The Director of the Office of Technology Assessment is authorized and directed to conduct a complete study of coal leases entered into by the United States under section 2 of the Act of February 25, 1920 (commonly known as the Mineral Lands Leasing Act). Such study shall include an analysis of all mining activities, present and potential value of said coal leases, receipts of the Federal Government from said leases, and recommendations as to the feasibility of the use of deep mining technology in said leased area. The Director shall submit the results of his study to the Congress within one year after the date of enactment of this Act.

SEC. 11. (a) Section 27(a)(1) of the Mineral Lands Leasing Act (30 U.S.C. 184(a)(1)), is amended to read as follows:

"(1) No person, association, or corporation, or any subsidiary, affiliate, or persons controlled by or under common control with such person, association, or corporation shall take, hold, own or control at one time, whether acquired directly from the Secretary under this Act or otherwise, coal leases or permits on an aggregate of more than forty-six thousand and eighty acres in any one State and in no case greater than an aggregate of one hundred thousand acres in the United States: *Provided*, That any person, association, or corporation currently holding, owning, or controlling more than an aggregate of one hundred thousand acres in the United States on the date of enactment of this section shall not be required on account of this section to relinquish said leases

or permits: *Provided, further,* That in no case shall such person, association, or corporation be permitted to take, hold, own, or control any further Federal coal leases or permits until such time as their holdings, ownership, or control of Federal leases or permits has been reduced below an aggregate of one hundred thousand acres within the United States.”.

(b) Subject to valid existing rights, section 27(a)(2) of the Mineral Lands Leasing Act (30 U.S.C. 184(a)(2)) is hereby repealed.

SEC. 12. (a) Section 3 of the Mineral Leasing Act for Acquired Lands (30 U.S.C. 352) is amended by striking out “(b) set apart for military or naval purposes, or (c)” and insert in lieu thereof “or (b)”.

(b) Such section 3 is further amended by inserting the following after the first sentence thereof: “Coal or lignite under acquired lands set apart for military or naval purposes may be leased by the Secretary, with the concurrence of the Secretary of Defense, to a governmental entity (including any corporation primarily acting as an agency or instrumentality of a State) which produces electrical energy for sale to the public if such governmental entity is located in the State in which such lands are located.”.

SEC. 13. (a) Subject to valid existing rights, section 4 of the Mineral Lands Leasing Act (30 U.S.C. 204) is hereby repealed.

(b) Subject to valid existing rights, section 3 of the Mineral Lands Leasing Act (30 U.S.C. 203) is amended to read as follows:

“SEC. 3. Any person, association, or corporation holding a lease of coal lands or coal deposits under the provisions of this Act may with the approval of the Secretary of the Interior, upon a finding by him that it would

be in the interest of the United States, secure modifications of the original coal lease by including additional coal lands or coal deposits contiguous to those embraced in such lease, but in no event shall the total area added by such modifications to an existing coal lease exceed one hundred sixty acres, or add acreage larger than that in the original lease. The Secretary shall prescribe terms and conditions which shall be consistent with this Act and applicable to all of the acreage in such modified lease.”.

SEC. 14. Section 39 of the Mineral Lands Leasing Act (30 U.S.C. 209) is amended by adding the following sentence at the end thereof: “Nothing in this section shall be construed as granting to the Secretary the authority to waive, suspend, or reduce advance royalties.”.

SEC. 15. Section 27 of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 184) is amended by adding at the end thereof the following new subsection:

“(1) (1) At each stage on the formulation and promulgation of rules and regulations concerning coal leasing pursuant to this Act, and at each stage in the issuance, renewal, and readjustment of coal leases under this Act, the Secretary of the Interior shall consult with and give due consideration to the views and advice of the Attorney General of the United States.

“(2) No coal lease may be issued, renewed, or readjusted under this Act until at least thirty days after the Secretary of the Interior notifies the Attorney General of the proposed issuance, renewal, or readjustment. Such notification shall contain such information as the Attorney General may require in order to advise the Secretary of the Interior as to whether such lease would create or maintain a situation inconsistent with the anti-trust laws. If the Attorney General advises the Secretary of the Interior that a lease would create or maintain such a situation, the Secretary of the Interior may not issue

such lease, nor may he renew or readjust such lease for a period not to exceed one year, as the case may be, unless he thereafter conducts a public hearing on the record in accordance with the Administrative Procedures Act and finds therein that such issuance, renewal, or readjustment is necessary to effectuate the purposes of this Act, that it is consistent with the public interest, and that there are no reasonable alternatives consistent with this Act, the antitrust laws, and the public interest.

“(3) Nothing in this Act shall be deemed to convey to any person, association, corporation, or other business organization immunity from civil or criminal liability, or to create defenses to actions, under any antitrust law.

“(4) As used in this subsection, the term ‘antitrust law’ means—

“(A) the act entitled ‘An Act to protect trade and commerce against unlawful restraints and monopolies’, approved July 2, 1890 (15 U.S.C. 1 et seq.), as amended;

“(B) the Act entitled ‘An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes’, approved October 15, 1914 (15 U.S.C. 12 et seq.), as amended;

“(C) the Federal Trade Commission Act (15 U.S.C. 41 et seq.), as amended;

“(D) sections 73 and 74 of the Act entitled ‘An Act to reduce taxation, to provide revenue for the Government, and for other purposes’, approved August 27, 1894 (15 U.S.C. 8 and 9), as amended; or

“(E) the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a).”.

SEC. 16. Nothing in this Act, or the Mineral Lands Leasing Act and the Mineral Leasing Act for Acquired

Lands which are amended by this Act, shall be construed as authorizing coal mining on any area of the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National System of Trails, and the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act.

CARL ALBERT

Speaker of the House of Representatives.

LEE METCALF

Acting President of the Senate pro tempore.

IN THE SENATE OF THE UNITED STATES,

August 3, 1976.

The Senate having proceeded to reconsider the bill (S. 391) entitled "An Act to amend the Mineral Leasing Act of 1920, and for other purposes", returned by the President of the United States with his objections, to the Senate, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

FRANCIS R. VALEO

Secretary.

I certify that this Act originated in the Senate.

FRANCIS R. VALEO

Secretary.

IN THE U.S. HOUSE OF REPRESENTATIVES

August 4, 1976.

The House of Representatives having proceeded to reconsider the bill (S. 391) entitled "An Act to amend the Mineral Leasing Act of 1920, and for other purposes", returned by the President of the United States with his objections, to the Senate, in which it originated, and passed by the Senate on reconsideration of the same, it was

APPENDIX F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

COAL LEASE

Act of February 25, 1920 (41 Stat. 437)

Land Office
Cheyenne, WyomingSerial Number
Wyoming 061421

This lease, entered into on March 1, 1963, by the United States of America, the lessor, through the Bureau of Land Management, and

FMC Corporation
P.O. Box 1728
Pocatello, Idaho

the lessee, pursuant and subject to the terms and provisions of the act of February 25, 1920 (41 Stat. 437), as amended, hereinafter referred to as the act, and to all reasonable regulations of the Secretary of the Interior now in force which are made a part hereof,

Witnesseth:

Section 1. *Rights of lessee.* The lessor, in consideration of the rents and royalties to be paid and the conditions to be observed as hereinafter set forth does hereby grant and lease to the lessee the exclusive right and privilege to mine and dispose of all the coal in the following-described tracts of land, situated in the State of Wyoming:

T. 19 N., R. 117 W., 6th P.M.

Sec. 22: All

Sec. 28: N $\frac{1}{2}$, SE $\frac{1}{4}$ Sec. 34: NW $\frac{1}{4}$

containing 1280 acres, more or less, together with the right to construct all such works, buildings, plants, structures, and appliances as may be necessary and convenient for the mining and preparation of the coal for market, the manufacture of coke or other products of coal, the housing and welfare of employees, and, subject to the conditions herein provided, to use so much of the surface as may reasonably be required in the exercise of the rights and privileges herein granted.

Sec. 2. In consideration of the foregoing, the lessee hereby agrees:

(a) *Bond*. To maintain the bond furnished upon the issuance of this lease, which bond is conditioned upon compliance with all the provisions of the lease, and to increase the amount or furnish such other bond as may be required.

(b) *Rental*. To pay the lessor annually, in advance, for each acre or part thereof covered by this lease, beginning with the date hereof, the following rentals: 25 cents for the first year, 50 cents for the second, third, fourth, and fifth years, respectively, and \$1 for the sixth and each succeeding year during the continuance of the lease, such rental for any year to be credited against the first royalties as they accrue under the lease during the year for which the rental was paid.

(c) *Royalty*. [To pay the lessor a royalty of — cents on every ton of 2,000 pounds of coal mined during the first 20 years succeeding the execution of this lease. Royalties shall be payable quarterly within 30 days from the expiration of the quarter in which the coal is mined.]*

(c) *Royalty*. To pay the lessor a royalty of 15¢ a ton for coal mined from underground operations and 17½¢ a ton for coal that is strip mined on every ton of 2,000 pounds of coal mined during the first 20 years succeed-

* Bold bracketed material struck through on original.

ing the execution of this lease. Royalties shall be payable quarterly within 30 days from the expiration of the quarter in which the coal is mined.

(d) *Minimum production.* Beginning with the sixth year of the lease, except when operations are interrupted by strikes, the elements, or casualties not attributable to the lessee, or unless on application and showing made, operations shall be suspended when market conditions are such that the lessee cannot operate except at a loss or suspended for the other reasons specified in section 39 of the act, to mine coal each year and pay a royalty thereon to a value of \$1 per acre or fraction thereof. Operations under this lease shall be continuous except in the circumstances described or unless the lessee shall pay a royalty, less rent, on such minimum amount of the leased deposits, for one year in advance, in which case operations may be suspended for that year. -

(e) *Payments.* To make rental payments to the Manager of the appropriate Land Office, except that when this lease becomes productive the rentals and royalties shall be paid to the appropriate Regional Mining Supervisor of the United States Geological Survey, with whom all reports concerning operations under the lease shall be filed. All remittances to the Manager of the Land Office shall be made payable to the Bureau of Land Management, those to the Geological Survey shall be made payable to the United States Geological Survey.

(f) *Plats, reports, maps.* At such times and in such form as the lessor may prescribe, to furnish a plat showing development work and improvements on the leased lands and a report with respect to stockholders, investment, depreciation, and costs. To furnish in such form as the lessor may prescribe, within 30 days from the expiration of each quarter a report covering such quarter, certified by the superintendent of the mine, or by such other agent having personal knowledge of the facts

as may be designated by the lessee for such purpose, showing the amount of leased deposits mined during the quarter, the character and quality thereof, amount of its products and byproducts disposed of and price received therefor, and amount in storage or held for sale. To keep and prepare maps of the leased lands in accordance with the regulations in 30 CFR, part 211.

(g) *Weights.* To determine accurately the weight or quantity and quality of all leased deposits mined, and to enter accurately the weight or quantity and quality thereof in due form in books to be kept and preserved by the lessee for such purposes.

(h) *Inspection.* To permit at all reasonable times (1) inspection by any duly authorized officer of the Department, of the leased premises and all surface and underground improvements, works, machinery, equipment, and all books and records pertaining to operations and surveys or investigations under this lease; and (2) the lessor to make copies of and extracts from any or all books and records pertaining to operations under this lease, if desired.

(i) *Assignment.* To file for approval in the appropriate Land Office within 90 days from the date of execution, any assignment or transfer made of this lease, whether by direct assignment, operating agreement, working or royalty interest, or otherwise. Such instrument will take effect the first day of the month following its approval by the Bureau of Land Management, or if the assignee requests, the first day of the month of approval. The showing required to be made with an assignment or transfer is set forth in the regulations. 43 CFR 193.25.

(j) *Nondiscrimination.* In connection with the performance of work under this lease, the lessee agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national

origin. The aforesaid provision shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The lessee also agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause. The lessee further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

(k) *Land disposed of with coal deposits reserved to the United States.* If the lands embraced herein have been or shall hereafter be disposed of under laws reserving to the United States the deposits of coal therein, to comply with all conditions as are or may hereafter be provided by the laws and regulations reserving such coal.

(l) *Operations, wages, freedom of purchase.* To comply with the operating regulations (30 CFR, part 211), to exercise reasonable diligence, skill, and care in the operations of the property, and to carry on all operations in accordance with approved methods and practices as provided in the operating regulations, having due regard for the prevention of injury to life, health or property, and of waste or damage to any water or mineral deposits; to fairly and justly weight or measure the coal mined by each miner, to pay all wages due miners and employees, both above and below ground, at least twice each month in lawful money of the United States; to accord all miners and employees complete freedom of purchase; to restrict the workday to not exceeding eight hours in any one day for underground workers, except in cases of emergency; to employ no boy under the age of sixteen and no girl or woman, without regard to age, in any mine below the surface, unless the laws of the

State otherwise provide, in which case the State laws control.

(m) *Taxes.* To pay when due, all taxes lawfully assessed and levied under the laws of the State or the United States upon improvements, output of mines, or other rights, property, or assets of the lessee.

(n) *Overriding royalties.* Not to create, by assignment or otherwise, an overriding royalty interest in excess of 50 percent of the rate of royalty first payable to the United States under this lease or an overriding royalty interest which when added to any other outstanding overriding royalty interest exceeds that percentage, excepting, that where an interest in the leasehold or in an operating agreement is assigned, the assignor may retain an overriding royalty interest in excess of the above limitation if he shows to the satisfaction of the Bureau of Land Management, that he has made substantial investments for improvements on the land covered by the assignment.

(o) *Delivery of premises in case of forfeiture.* In case of forfeiture of this lease, to deliver up to the lessor in good order and condition the land leased, including all buildings, and underground timbering and such other supports and structures as are necessary for the preservation of the mine or deposit.

Sec. 3. The lessor expressly reserves:

(a) *Rights reserved.* The right to permit for joint or several use such easements or rights-of-way, including easements in tunnels upon, through, or in the land leased, occupied, or used as may be necessary or appropriate to the working of the same or other lands containing the deposits described in the act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

(b) *Disposition of surface.* The right to lease, sell, or otherwise dispose of the surface of the leased lands under existing law or laws hereafter enacted, insofar as said surface is not necessary for the use of the lessee in the extraction and removal of the coal therein, or to dispose of any resource in such lands which will not unreasonably interfere with operations under this lease.

(c) *Monopoly and fair prices.* Full power and authority to promulgate and enforce all the provisions of section 30 of the act to insure the sale of the production of said leased lands to the United States and to the public at reasonable prices, to prevent monopoly, and to safeguard the public welfare.

(d) *Readjustment of terms.* The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease otherwise provided by law at the time of the expiration of any such period. Unless the lessee files objections to the proposed terms or a relinquishment of the lease within 30 days after receipt of the notice of proposed terms for a 20-year period, he will be deemed to have agreed to such terms.

(e) *Waiver of conditions.* The right to waive any breach of the conditions contained herein, except the breach of such conditions as are required by the act, but any such waiver shall extend only to the particular breach so waived and shall not limit the rights of the lessor with respect to any future breach; nor shall the waiver of a particular cause of forfeiture prevent cancellation of this lease for any other cause, or for the same cause occurring at another time.

Sec. 4. *Relinquishment of lease.* Upon a satisfactory showing that the public interest will not be impaired, the lessee may surrender the entire lease or any legal subdivision thereof. A relinquishment must be filed in duplicate in the appropriate Land Office. Upon its ac-

ceptance it shall be effective as of the date it is filed, subject to the continued obligation of the lessee and his surety to make payment of all accrued rentals and royalties and to provide for the preservation of any mines or productive works or permanent improvements on the leased land in accordance with the regulations and terms of the lease.

Sec. 5. *Protection of the surface, natural resources, and improvements.* The lessee agrees to take such reasonable steps as may be needed to prevent operations from unnecessarily: (1) Causing or contributing to soil erosion or damaging any forage and timber growth thereon; (2) polluting the waters of springs, streams, wells, or reservoirs; (3) damaging crops, including forage, timber, or improvements of a surface owner; or (4) damaging range improvements whether owned by the United States or by its grazing permittees or lessees; and upon any partial or total relinquishment or the cancellation or expiration of this lease, or at any other time prior thereto when required by the lessor and to the extent deemed necessary by the lessor, to fill any sump holes, ditches and other excavations, remove or cover all debris, and, so far as reasonably possible, restore the surface of the leased land to its former condition, including the removal of structures as and if required. The lessor may prescribe the steps to be taken and restoration to be made with respect to lands of the United States and improvements thereon.

Sec. 6. *Removal of equipment, etc., on termination of lease.* Upon termination of this lease, by surrender or forfeiture, the lessee shall have the privilege at any time within a period of 90 days thereafter of removing from the premises all machinery, equipment, tools and materials, other than underground timbering placed by the lessee in or on the leased lands, which are not necessary for the preservation of the mine. Any materials, tools, appliances, machinery, structures, and equipment, subject to removal as above provided, which are allowed to

remain on the leased lands shall become the property of the lessor on expiration of the 90-day period or such extension thereof as may be granted because of adverse climatic conditions, but the lessee shall remove any or all of such property where so directed by the lessor.

Sec. 7. *Proceedings in case of default.* If the lessee shall not comply with any of the provisions of the act or the regulations thereunder or default in the performance or observance of any of the provisions of this lease, and such default shall continue for a period of 30 days after service of written notice thereof by the lessor, the lessor may institute appropriate proceedings in a court of competent jurisdiction for the forfeiture and cancellation of this lease as provided in section 31 of the act (30 USC, sec. 188). If the lessee fails to take prompt and necessary steps to prevent loss or damage to the mine, property, or premises, or danger to the employees, the lessor may enter on the premises and take such measures as may be deemed necessary to prevent such loss or damage or to correct the dangerous or unsafe condition of the mine or works thereof, which shall be at the expense of the lessee. However, the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

Sec. 8. *Heirs and successors in interest.* Each obligation hereunder shall extend to, and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

Sec. 9. *Unlawful interest.* No member of, or Delegate to, Congress or Resident Commissioner, after his election or appointment, or either before or after he has qualified and during his continuance in office, and no officer, agent, or employee of the Department of the Interior, except as provided in 43 CFR 7.4(a)(1), shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; and the provisions of

section 3741 of the Revised Statutes of the United States, as amended (41 USC, sec. 22), and sections 431, 432, and 433, title 18, U. S Code, relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

IN WITNESS WHEREOF:

Witnesses to Signature of Lessee

ATTEST:

/s/ W. A. Kebba
W.A. KEBBA
Assistant Secretary

/s/ Richard J. McNamara
RICHARD J. MCNAMARA

/s/ A. M. Bretschger
A.M. BRETSCHGER

THE UNITED STATES OF AMERICA

By /s/ Thomas H. Floyd, Jr.
(Signing Officer)

THOMAS H. FLOYD, JR.
Manager, Land Office
Bureau of Management
Cheyenne, Wyoming
March 22, 1963
(Date)

FMC CORPORATION

By /s/ W. N. Williams
(Signature of Lessee)

W.N. WILLIAMS
Senior Vice President
(Signature of Lessee)

(If this lease is executed by a corporation, it must bear the corporate seal)

CITY, COUNTY & STATE OF NEW YORK, ss:

On this 14th day of March 1963, before me personally Stephen Plum and Mary E. Asplund to me known, who, being by me duly sworn, did depose and say that they reside in Orange, New Jersey and Brooklyn, New York respectively; that they are Assistant Secretary and Attorney-in-Fact respectively of the FEDERAL INSURANCE COMPANY, the corporation described in and which executed the annexed instrument; that they know the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order and authority of the Board of Directors of said corporation, and that they signed their names thereto by like order and authority.

*Sworn to and Acknowledged
before me on the date above
written*

/s/ Marion J. McGrath
MARION J. MCGRATH
Notary Public,
State of New York
No. 24-7337850
Qualified in Kings County
Cert. filed in New York
County
Commission Expires
March 30, 1964

*Certified Copy of Resolution Authorizing
Execution of Bonds*

At a regular meeting of the Board of Directors of the FEDERAL INSURANCE COMPANY, duly held at the office of the Company in New York, N.Y., on the 30th day of November, 1961, a quorum being present, on motion it was unanimously

“RESOLVED, That any two of the following: Percy Chubb, 2nd, President; Nathan Mobley, Ernest W. Fields, Alexander Kerner, Vice Presidents; Frederick C. Gardner, Fred Moran, Assistant Vice Presidents; Joseph J. Magrath, Secretary; Bradley C. Drowne, Donald H. Haeseker, John C. Harden, Richard G. Hight, George C. Josephson, Willis Koenig, Arthur A. Kuhne, Walter La-Forge, Roy Little, Horace C. Neville, Stephen Plum, Davis Quinn, Daniel F. Randolph, Assistant Secretaries of this Company; *OR that any one of said persons AND* Clara Aragona or Mary E. Asplund or Richard L. Boyle or Elaine M. Cordes or Marie C. Gotthard or M. C. Hoefer or Emily Kraft or Richard H. Lewis or John P. Madigan, Jr., or Richard D. O'Connor or Matilda Smith, who are hereby appointed Attorneys-in-Fact of this Company for the purposes specified in this Resolution; *be and they are hereby authorized to jointly execute* under their respective designations, in this Company's name and to affix its Corporate seal to, and deliver for and on its behalf, as surety thereon or otherwise, bonds or obligations given or executed in the course of this Company's business, and any instruments amending or altering the same, and consents to the modification or alteration or assignment of any instruments referred to in said bonds or obligations, and the execution of any and all instruments in this Company's name and on its behalf as surety thereon or otherwise by such persons in the authorized manner and under their respective designation, under the seal of this Company, in pursuance of the authority hereby conferred, shall be valid and binding upon this Company.”

Financial Statement of Federal Insurance Company
as of December 31, 1961

ASSETS

United States Government Bonds -----	\$ 57,011,442
State and Municipal Bonds -----	36,588,942
Other Bonds -----	8,463,257
Preferred and Guaranteed Stocks -----	5,437,332
Common Stocks -----	91,519,891
Capital Stock of Vigilant Insurance Company -	18,102,440
Capital Stock of Great Northern Insurance Company -----	5,951,397
Capital Stock (97%) of The Colonial Life Insurance Company of America -----	7,609,150
TOTAL INVESTMENTS -----	230,683,851
Cash -----	9,330,191
Premiums not over 90 days due -----	6,010,808
Other Assets -----	6,688,841
TOTAL ADMITTED ASSETS -----	\$252,713,691

LIABILITIES AND SURPLUS TO POLICYHOLDERS

Unearned Premiums -----	\$ 50,122,412
Outstanding Losses and Clams -----	40,266,885
Dividends Payable -----	1,748,353
Taxes, Expenses and Other Liabilities -----	7,159,182
Funds Held Under Reinsurance Treaties ----	5,052,768
Non-Admitted Reinsurance -----	6,579,100
TOTAL LIABILITIES -----	110,928,700
Capital Stock -----	13,986,828
Surplus -----	61,894,342
Unrealized Appreciation of Investments -----	65,903,821
SURPLUS TO POLICYHOLDERS -----	141,784,991
TOTAL -----	\$252,713,691

Investments are valued in accordance with requirements of the National Association of Insurance Commissioners.

Investments valued at \$7,576,436 are deposited with government authorities and trustee as required by law.

Certification

CITY, COUNTY & STATE OF NEW YORK, ss:

I, Willis Koenig, Assistant Secretary of the FEDERAL INSURANCE COMPANY, do hereby certify that I have compared the foregoing resolution with the original thereof as recorded in the Minute Book of said Company, and that the same is a correct and true copy of the whole of said original resolution and that said resolution has not been modified or rescinded; that the Company is duly and legally incorporated under the laws of the State of New Jersey and has complied with the provisions of the Act of Congress August 13, 1894, as amended, allowing certain corporations to be accepted as Surety on bonds; that the *Company is duly licensed to transact fidelity and surety business in each of the States of the United States of America, Puerto Rico, and in each of the Provinces of the Dominion of Canada with the exception of Prince Edward Island.*

Given under my hand and seal of said Company at the City of New York, this 14th day of March 1963.

/s/ Willis Koenig
Assistant Secretary

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Land Office
Cheyenne, Wyoming

Serial Number
Wyoming 061422

COAL LEASE

Act of February 25, 1920 (41 Stat. 437)

This lease, entered into on March 1, 1963, by the United States of America, the lessor, through the Bureau of Land Management, and

FMC Corporation
P.O. Box 1728
Pocatello, Idaho

the lessee, pursuant and subject to the terms and provisions of the act of February 25, 1920 (41 Stat. 437), as amended, hereinafter referred to as the act, and to all reasonable regulations of the Secretary of the Interior now in force which are made a part hereof,

Witnesseth:

Section 1. *Rights of lessee.* The lessor, in consideration of the rents and royalties to be paid and the conditions to be observed as hereinafter set forth does hereby grant and lease to the lessee the exclusive right and privilege to mine and dispose of all the coal in the following-described tracts of land, situated in the State of Wyoming:

- T. 19 N., R. 117 W., 6th P.M.
 - Sec. 4: Lots 1, 2, S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$
 - Sec. 10: All
- T. 20 N., R. 117 W., 6th P.M.
 - Sec. 28: E $\frac{1}{2}$
 - Sec. 34: All

containing 1921.68 acres, more or less, together with the right to construct all such works, buildings, plants, structures, and appliances as may be necessary and convenient for the mining and preparation of the coal for market, the manufacture of coke or other products of coal, the housing and welfare of employees, and, subject to the conditions herein provided, to use so much of the surface as may reasonably be required in the exercise of the rights and privileges herein granted.

Sec. 2. In consideration of the foregoing, the lessee hereby agrees:

(a) *Bond*. To maintain the bond furnished upon the issuance of this lease, which bond is conditioned upon compliance with all the provisions of the lease, and to increase the amount or furnish such other bond as may be required.

(b) *Rental*. To pay the lessor annually, in advance, for each acre or part thereof covered by this lease, beginning with the date hereof, the following rentals: 25 cents for the first year, 50 cents for the second, third, fourth, and fifth years, respectively, and \$1 for the sixth and each succeeding year during the continuance of the lease, such rental for any year to be credited against the first royalties as they accrue under the lease during the year for which the rental was paid.

(c) *Royalty*. [To pay the lessee a royalty of — cents on every ton of 2,000 pounds of coal mined during the first 20 years succeeding the execution of this lease. Royalties shall be payable quarterly within 30 days from the expiration of the quarter in which the coal is mined.]*

(c) *Royalty*. To pay the lessor a royalty of 15¢ a ton for coal mined from underground operations and 17½¢ a ton for coal that is strip mined on every ton of 2,000 pounds of coal mined during the first 20 years succeeding the execution of this lease. Royalties shall be

* Bold bracketed material struck through on original.

payable quarterly within 30 days from the expiration of the quarter in which the coal is mined.

(d) *Minimum production.* Beginning with the sixth year of the lease, except when operations are interrupted by strikes, the elements, or casualties not attributable to the lessee, or unless on application and showing made, operations shall be suspended when market conditions are such that the lessee cannot operate except at a loss or suspended for the other reasons specified in section 39 of the act, to mine coal each year and pay a royalty thereon to a value of \$1 per acre or fraction thereof. Operations under this lease shall be continuous except in the circumstances described or unless the lessee shall pay a royalty, less rent, on such minimum amount of the leased deposits, for one year in advance, in which case operations may be suspended for that year.

(e) *Payments.* To make rental payments to the Manager of the appropriate Land Office, except that when this lease becomes productive the rentals and royalties shall be paid to the appropriate Regional Mining Supervisor of the United States Geological Survey, with whom all reports concerning operations under the lease shall be filed. All remittances to the Manager of the Land Office shall be made payable to the Bureau of Land Management, those to the Geological Survey shall be made payable to the United States Geological Survey.

(f) *Plats, reports, maps.* At such times and in such form as the lessor may prescribe, to furnish a plat showing development work and improvements on the leased lands and a report with respect to stockholders, investment, depreciation, and costs. To furnish in such form as the lessor may prescribe, within 30 days from the expiration of each quarter a report covering such quarter, certified by the superintendent of the mine, or by such other agent having personal knowledge of the facts as may be designated by the lessee for such purpose, showing the amount of leased deposits mined during the quarter, the character and quality thereof, amount of its

products and byproducts disposed of and price received therefor, and amount in storage or held for sale. To keep and prepare maps of the leased lands in accordance with the regulations in 30 CFR, part 211.

(g) *Weights.* To determine accurately the weight or quantity and quality of all leased deposits mined, and to enter accurately the weight or quantity and quality thereof in due form in books to be kept and preserved by the lessee for such purposes.

(h) *Inspection.* To permit at all reasonable times (1) inspection by any duly authorized officer of the Department, of the leased premises and all surface and underground improvements, works, machinery, equipment, and all books and records pertaining to operations and surveys or investigations under this lease; and (2) the lessor to make copies of and extracts from any or all books and records pertaining to operations under this lease, if desired.

(i) *Assignment.* To file for approval in the appropriate Land Office within 90 days from the date of execution, any assignment or transfer made of this lease, whether by direct assignment, operating agreement, working or royalty interest, or otherwise. Such instrument will take effect the first day of the month following its approval by the Bureau of Land Management, or if the assignee requests, the first day of the month of approval. The showing required to be made with an assignment or transfer is set forth in the regulations. 43 CFR 193.25.

(j) *Nondiscrimination.* In connection with the performance of work under this lease, the lessee agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms

of compensation; and selection for training, including apprenticeship. The lessee also agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause. The lessee further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

(k) *Land disposed of with coal deposits reserved to the United States.* If the lands embraced herein have been or shall hereafter be disposed of under laws reserving to the United States the deposits of coal therein, to comply with all conditions as are or may hereafter be provided by the laws and regulations reserving such coal.

(l) *Operations, wages, freedom of purchase.* To comply with the operating regulations (30 CFR, part 211), to exercise reasonable diligence, skill, and care in the operations of the property, and to carry on all operations in accordance with approved methods and practices as provided in the operating regulations, having due regard for the prevention of injury to life, health or property, and of waste or damage to any water or mineral deposits; to fairly and justly weight or measure the coal mined by each miner, to pay all wages due miners and employees, both above and below ground, at least twice each month in lawful money of the United States; to accord all miners and employees complete freedom of purchase; to restrict the workday to not exceeding eight hours in any one day for underground workers, except in cases of emergency; to employ no boy under the age of sixteen and no girl or woman, without regard to age, in any mine below the surface, unless the laws of the State otherwise provide, in which case the State laws control.

(m) *Taxes.* To pay when due, all taxes lawfully assessed and levied under the laws of the State or the

United States upon improvements, output of mines, or other rights, property, or assets of the lessee.

(n) *Overriding royalties.* Not to create, by assignment or otherwise, an overriding royalty interest in excess of 50 percent of the rate of royalty first payable to the United States under this lease or an overriding royalty interest which when added to any other outstanding overriding royalty interest exceeds that percentage, excepting, that where an interest in the leasehold or in an operating agreement is assigned, the assignor may retain an overriding royalty interest in excess of the above limitation if he shows to the satisfaction of the Bureau of Land Management, that he has made substantial investments for improvements on the land covered by the assignment.

(o) *Delivery of premises in case of forfeiture.* In case of forfeiture of this lease, to deliver up to the lessor in good order and condition the land leased, including all buildings, and underground timbering and such other supports and structures as are necessary for the preservation of the mine or deposit.

Sec. 3. The lessor expressly reserves:

(a) *Rights reserved.* The right to permit for joint or several use such easements or rights-of-way, including easements in tunnels upon, through, or in the land leased, occupied, or used as may be necessary or appropriate to the working of the same or other lands containing the deposits described in the act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

(b) *Disposition of surface.* The right to lease, sell, or otherwise dispose of the surface of the leased lands under existing law or laws hereafter enacted, insofar as said surface is not necessary for the use of the lessee in

the extraction and removal of the coal therein, or to dispose of any resource in such lands which will not unreasonably interfere with operations under this lease.

(c) *Monopoly and fair prices.* Full power and authority to promulgate and enforce all the provisions of section 30 of the act to insure the sale of the production of said leased lands to the United States and to the public at reasonable prices, to prevent monopoly, and to safeguard the public welfare.

(d) *Readjustment of terms.* The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease otherwise provided by law at the time of the expiration of any such period. Unless the lessee files objections to the proposed terms or a relinquishment of the lease within 30 days after receipt of the notice of proposed terms for a 20-year period, he will be deemed to have agreed to such terms.

(e) *Waiver of conditions.* The right to waive any breach of the conditions contained herein, except the breach of such conditions as are required by the act, but any such waiver shall extend only to the particular breach so waived and shall not limit the rights of the lessor with respect to any future breach; nor shall the waiver of a particular cause of forfeiture prevent cancellation of this lease for any other cause, or for the same cause occurring at another time.

Sec. 4. *Relinquishment of lease.* Upon a satisfactory showing that the public interest will not be impaired, the lessee may surrender the entire lease or any legal subdivision thereof. A relinquishment must be filed in duplicate in the appropriate Land Office. Upon its acceptance it shall be effective as of the date it is filed, subject to the continued obligation of the lessee and his

surety to make payment of all-accrued rentals and royalties and to provide for the preservation of any mines or productive works or permanent improvements on the leased land in accordance with the regulations and terms of the lease.

Sec. 5. *Protection of the surface, natural resources, and improvements.* The lessee agrees to take such reasonable steps as may be needed to prevent operations from unnecessarily: (1) Causing or contributing to soil erosion or damaging any forage and timber growth thereon; (2) polluting the waters of springs, streams, wells, or reservoirs; (3) damaging crops, including forage, timber, or improvements of a surface owner; or (4) damaging range improvements whether owned by the United States or by its grazing permittees or lessees; and upon any partial or total relinquishment or the cancellation or expiration of this lease, or at any other time prior thereto when required by the lessor and to the extent deemed necessary by the lessor, to fill any sump holes, ditches and other excavations, remove or cover all debris, and, so far as reasonably possible, restore the surface of the leased land to its former condition, including the removal of structures as and if required. The lessor may prescribe the steps to be taken and restoration to be made with respect to lands of the United States and improvements thereon.

Sec. 6. *Removal of equipment, etc., on termination of lease.* Upon termination of this lease, by surrender or forfeiture, the lessee shall have the privilege at any time within a period of 90 days thereafter of removing from the premises all machinery, equipment, tools and materials, other than underground timbering placed by the lessee in or on the leased lands, which are not necessary for the preservation of the mine. Any materials, tools, appliances, machinery, structures, and equipment, subject to removal as above provided, which are allowed to remain on the leased lands shall become the property of the lessor on expiration of the 90-day period or such ex-

tension thereof as may be granted because of adverse climatic conditions, but the lessee shall remove any or all of such property where so directed by the lessor.

Sec. 7. *Proceedings in case of default.* If the lessee shall not comply with any of the provisions of the act or the regulations thereunder or default in the performance or observance of any of the provisions of this lease, and such default shall continue for a period of 30 days after service of written notice thereof by the lessor, the lessor may institute appropriate proceedings in a court of competent jurisdiction for the forfeiture and cancellation of this lease as provided in section 31 of the act (30 USC, sec. 188). If the lessee fails to take prompt and necessary steps to prevent loss or damage to the mine, property, or premises, or danger to the employees, the lessor may enter on the premises and take such measures as may be deemed necessary to prevent such loss or damage or to correct the dangerous or unsafe condition of the mine or works thereof, which shall be at the expense of the lessee. However, the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

Sec. 8. *Heirs and successors in interest.* Each obligation hereunder shall extend to, and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

Sec. 9. *Unlawful interest.* No member of, or Delegate to, Congress or Resident Commissioner, after his election or appointment, or either before or after he has qualified and during his continuance in office, and no officer, agent, or employee of the Department of the Interior, except as provided in 43 CFR 7.4(a)(1), shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; and the provisions of section 3741 of the Revised Statutes of the United States,

as amended (41 USC, sec. 22), and sections 431, 432, and 433, title 18, U. S Code, relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

IN WITNESS WHEREOF:

Witnesses to Signature of Lessee

ATTEST:

/s/ W. A. Kebba
W.A. KEBBA
Assistant Secretary

/s/ Richard J. McNamara
RICHARD J. MCNAMARA

/s/ A. M. Bretschger
A.M. BRETSCHGER

THE UNITED STATES OF AMERICA

By /s/ Thomas H. Floyd, Jr.
THOMAS H. FLOYD, JR.
(Signing Officer)

Manager, Land Office
Bureau of Management
Cheyenne, Wyoming
March 22, 1963
(Date)

FMC CORPORATION

By /s/ W. N. Williams
(Signature of Lessee)

W.N. WILLIAMS
Senior Vice President
(Signature of Lessee)

(If this lease is executed by a corporation, it must bear the corporate seal)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

FED. INS. CO. BOND NO. 8015-13-34
BOND * UNDER LEASE FOR
MINING COAL DEPOSITS

Land Office
P.O. Box 929
Cheyenne, Wyoming
Serial Number
Wyoming 061422

KNOW ALL MEN BY THESE PRESENTS, That FMC Corporation of 633 Third Avenue, New York 17, N.Y., as principal, and Federal Insurance Company of 90 John Street, New York 6, N.Y., as surety, are held and firmly bound unto the United States in the sum of Five Thousand and 00/100 dollars (\$5,000.00), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The conditions of this obligation are such, that whereas the said principal entered into a lease of the lands described therein and upon conditions therein expressed, which lease bears the above serial number.

* This form of bond may be used in connection with coal, phosphate, and sodium leases, Act of February 25, 1920, as amended (30 U.S.C., 181 et seq.); potassium leases, Act of February 7, 1927, as amended (30 U.S.C., 281 et seq.); sulphur leases, Act of April 17, 1926, as amended (30 U.S.C., 271 et seq.); all such leases involving acquired lands, Act of August 7, 1947 (30 U.S.C. 351), and asphalt leases, Act of June 28, 1944 (58 Stat. 463, 483-485), by inserting the particular mineral applicable in the space provided therefor. If this bond is executed by a corporation, it must bear the corporate seal.

NOW, THEREFORE, if the said principal, his heirs, executors, administrators, or successors, shall faithfully carry out the obligations and observe the requirements of said lease, and shall duly keep, perform, and abide by each and every term and provision of said lease as therein stipulated and agreed, then this obligation shall be null and void; otherwise to remain in full force and effect.

Signed on this 14th day of March, 1963, in presence of:

/s/ Richard J. McNamara
(Signature of Witness)
RICHARD J. MCNAMARA
217 East 66th Street
New York 21, N.Y.
(Address of Witness)

/s/ Kathleen A. Walliser
(Signature of Witness)
90 John Street, N.Y.C.
(Address of Witness)

/s/ Edith Lloyd
(Signature of Witness)
90 John Street, N.Y.C.
(Address of Witness)

83a

FMC CORPORATION

By /s/ W. N. Williams
(Signature of Principal)
W. N. WILLIAMS
Senior Vice President
633 Third Avenue
New York 17, N.Y.
(Address of Principal)

FEDERAL INSURANCE COMPANY

By /s/ Stephen Plum (L.S.)
STEPHEN PLUM
Ass't Sec'ty

And

/s/ Mary E. Asplund
MARY E. ASPLUND
Attorney-in-Fact
90 John Street
New York 6, N.Y.
(Address of Surety)

CITY, COUNTY & STATE OF NEW YORK, ss:

On this 14th day of March 1963, before me personally Stephen Plum and Mary E. Asplund to me known, who, being by me duly sworn, did depose and say that they reside in Orange, New Jersey and Brooklyn, New York respectively; that they are Assistant Secretary and Attorney-in-Fact respectively of the FEDERAL INSURANCE COMPANY, the corporation described in and which executed the annexed instrument; that they know the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order and authority of the Board of Directors of said corporation, and that they signed their names thereto by like order and authority.

*Sworn to and Acknowledged before
me on the date above written*

/s/ Marion J. McGrath
MARION J. MCGRATH
Notary Public, State of New York
No. 24-7837850
Qualified in Kings County
Cert. filed in New York County
Commission Expires March 30, 1984

Certified Copy of Resolution Authorizing Execution
of Bonds

At a regular meeting of the Board of Directors of the FEDERAL INSURANCE COMPANY, duly held at the office of the Company in New York, N.Y., on the 30th day of November, 1961, a quorum being present, on motion it was unanimously

"RESOLVED, That any two of the following: Percy Chubb, 2nd, President; Nathan Mobley, Ernest W. Fields, Alexander Kerner, Vice Presidents; Frederick C. Gardner, Fred Moran, Assistant Vice President; Joseph J. Magrath, Secretary; Bradley C. Drowne, Donald H. Haeseker, John C. Harden, Richard G. Hight, George C. Josephson, Willis Koenig, Arthur A. Kuhne, Walter LaForge, Roy Little, Horace C. Neville, Stephen Plum, Davis Quinn, Daniel F. Randolph, Assistant Secretaries of this Company; *OR that any one of said persons AND Clara Aragona or Mary E. Asplund or Richard L. Boyle or Elaine M. Cordes or Marie C. Gotthard or M. C. Hoefer or Emily Kraft or Richard H. Lewis or John P. Madigan, Jr., or Richard D. O'Connor or Matilda Smith*, who are hereby appointed Attorney-in-Fact of this Company for the purposes specified in this Resolution; *he and they are hereby authorized to jointly execute* under their respective designations, in this Company's name and to affix its Corporate seal to, and deliver for and on its behalf, as surety thereon or otherwise, bonds or obligations given or executed in the course of this Company's business, and any instruments amending or altering the same, and consents to the modification or alteration or assignment of any instruments referred to in said bonds or obligations, and the execution of any and all instruments in this Company's name and on its behalf as surety thereon or otherwise by such persons in the authorized manner and under their respective designation, under the seal of this Company, in pursuance of the authority hereby conferred, shall be valid and binding upon this Company.

Financial Statement of Federal Insurance Company
as of December 31, 1961

ASSETS

United States Government Bonds -----	\$ 57,011,442
State and Municipal Bonds -----	36,588,942
Other Bonds -----	8,463,257
Preferred and Guaranteed Stocks -----	5,437,332
Common Stocks -----	91,519,891
Capital Stock of Vigilant Insurance Company -	18,102,440
Capital Stock of Great Northern Insurance Company -----	5,951,397
Capital Stock (97%) of The Colonial Life Insurance Company of America -----	7,609,150
TOTAL INVESTMENTS -----	230,683,851
Cash -----	9,330,191
Premiums not over 90 days due -----	6,010,808
Other Assets -----	6,688,841
TOTAL ADMITTED ASSETS -----	<u>\$252,713,691</u>

LIABILITIES AND SURPLUS TO POLICYHOLDERS

Unearned Premiums -----	\$ 50,122,412
Outstanding Losses and Clams -----	40,266,885
Dividends Payable -----	1,748,353
Taxes, Expenses and Other Liabilities -----	7,159,182
Funds Held Under Reinsurance Treaties ----	5,052,768
Non-Admitted Reinsurance -----	6,579,100
TOTAL LIABILITIES -----	110,928,700
Capital Stock -----	13,986,828
Surplus -----	61,894,342
Unrealized Appreciation of Investments ----	65,903,821
SURPLUS TO POLICYHOLDERS -----	141,784,991
TOTAL -----	<u>\$252,713,691</u>

Investments are valued in accordance with requirements of the National Association of Insurance Commissioners.

Investments valued at \$7,576,436 are deposited with government authorities and trustee as required by law.

Certification

CITY, COUNTY & STATE OF NEW YORK, ss:

I, Willis Koenig, Assistant Secretary of the FEDERAL INSURANCE COMPANY, do hereby certify that I have compared the foregoing resolution with the original thereof as recorded in the Minute Book of said Company, and that the same is a correct and true copy of the whole of said original resolution and that said resolution has not been modified or rescinded; that the Company is duly and legally incorporated under the laws of the State of New Jersey and has complied with the provisions of the Act of Congress August 13, 1894, as amended, allowing certain corporations to be accepted as Surety on bonds; that the *Company is duly licensed to transact fidelity and surety business in each of the States of the United States of America, Puerto Rico, and in each of the Provinces of the Dominion of Canada with the exception of Prince Edward Island.*

Given under my hand and seal of said Company at the City of New York, this 14th day of March, 1963.

/s/ Willis Koenig
Assistant Secretary

APPENDIX G

cc:

District Supervisor for Mining, Rock Springs District,
North Central Region, Minerals Management Service,
P.O. Box 1170, Rock Springs, Wyoming 82601 (w/cy
readjusted lease)

Conservation Manager, Minerals Management Service,
Rm 4130, 100 E. "B" Street, Casper, Wyoming 82601
(w/cy readjusted lease)

Royalty Management Program, ATTN: Manager, Ac-
counting Center, P.O. Box 5760, Denver, Colorado
80217-5760 (w/cy readjusted lease)

DM, Rock Springs (w/cy readjusted lease)

bc:

Nancy H. McMillen, Attorney, Energy Section, Antitrust
Division, Department of Justice, P.O. Box 14141,
Washington, D.C. 30044 (w/cy of readjusted lease)

JMoffitt:agl 12-22-82

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

COAL LEASE READJUSTMENT

Serial Number W-061421

Lease Date March 1, 1963

This lease between the United States of America, the lessor through the Bureau of Land Management, and

FMC Corporation
P.O. Box 750
Kemmerer, Wyoming 83101

is readjusted effective as of March 1, 1983, the lessee.

Sec. 1. STATUTES AND REGULATIONS—This lease is issued pursuant and subject to the terms and provisions of the Mineral Leasing Act of February 25, 1920. 41 Stat. 437, as amended. 30 U.S.C. Sections 181-287 and 90 Stat. 1083-1092, hereafter referred to as the Act, and of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1201 et seq., and the Mineral Leasing Act for Acquired Lands of August 7, 1947, as amended, 30 U.S.C. 351-359 et seq. This lease is subject to all regulations of the Secretary of the Interior (including but not limited to 30 CFR Part 211 and Chapter VII and 43 CFR Group 3400) which are now in force or (except as expressly limited herein) hereafter in force, and all such regulations are made a part hereof. No amendment to the regulations made subsequent to the effective date hereof shall alter the rental and production royalty requirements in Sections 5 and 6 of this lease until the next readjustment of this lease.

WITNESSETH:

Sec. 2. RIGHTS OF LESSEE—The lessor, in consideration of rents and royalties and other conditions herein-

after set forth, hereby grants to the lessee the exclusive right and privilege to mine and dispose of all coal in the following described tracts (lease lands) situated in the State of Wyoming

T. 19 N., R. 117 W., 6th Principal Meridian, Lincoln County

sec. 22, all;

sec. 28, N $\frac{1}{2}$, SE $\frac{1}{4}$;

sec. 34, NW $\frac{1}{4}$.

containing 1280.00 acres, more or less and, together with the right to construct all works, buildings, structures, equipment, and appliances which may be necessary and convenient for the mining and preparation of the coal for market, and, subject to the conditions herein provided, to use so much of the surface as may reasonably be required in the exercise of the rights and privileges herein granted for so long as this lease remains in full force and effect under any provisions of the law and the applicable regulations thereunder.

Sec. 3. DILIGENT DEVELOPMENT AND CONTINUED OPERATION—The lessee shall engage in the diligent development of the coal resources subject to the lease. After diligent development is achieved, the lessee shall maintain continued operation of the mine or mines on the leased lands. The terms diligent development and continued operation are defined in the applicable regulations in Titles 30 and 43 of the Code of Federal Regulations.

Sec. 4 BONDS—The lessee shall file with the appropriate Bureau of Land Management office a lease bond in the amount of \$5,000 for the use and benefit of the United States, to insure payment of rentals and royalties and to insure compliance with all other terms of the lease, the regulations and the Act (except for reclamation within the area covered by a surface mining permit issued under

the permanent regulatory program by the regulatory authority) and, if appropriate, for the protection of the interest of the surface owners on the leased lands. An increase in the amount of the lease bond may be required by the lessor at any time during the life of the lease to reflect changed conditions.

Sec. 5 RENTAL—An annual rental of \$3.00 for each acre or fraction thereof shall be paid in advance on or before each anniversary date of this lease. Rentals paid for any lease year commencing prior to the effective date of this readjustment shall be credited against royalties for that year. Rentals due and payable for any lease year commencing on or after the effective date of this readjustment may not be credited against royalties (43 CFR 347331).

Sec. 6 PRODUCTION ROYALTY—The lessee shall pay a production royalty of 12½ percent of the value of coal produced by strip or auger methods and 8 percent of the value of coal produced by underground mining methods. The value of coal shall be determined as set forth in 30 CFR 211. Production royalties paid for a calendar month shall be reduced by the amount of any advance royalties paid under this lease to the extent that such advance royalties have not been used to reduce production royalties in a previous month. However, production royalties payable after the 20th year of the lease shall not be reduced by advance royalties paid during the first 20 years of the lease. Production royalties shall be payable the final day of the month succeeding the calendar month in which the coal is sold, unless otherwise specified in 30 CFR 211.

Sec. 7 ADVANCE ROYALTY—Upon request by the lessee the District Mining Supervisor may accept, for a total of not more than 10 years, the payment of advance royalties in lieu of continued operation consistent with the regulations in 43 CFR 3473 and 30 CFR 211. The advance royalty shall be based on a percent of the value

of a minimum number of tons which shall be determined in the manner established by the regulations in 30 CFR 211.

Sec. 8 METHOD OF PAYMENTS—The lessee shall make rental payments to the appropriate Bureau of Land Management office until production royalties become payable. Thereafter, all rentals, production royalties and advance royalties shall be paid to the appropriate office of the United States Minerals Management Service.

Sec. 9 EXPLORATION PLAN—The lessee shall not commence any exploration, except casual use, on the leased lands without an approved exploration plan. Exploration plans for leased lands covered by an approved mining permit shall be submitted to the Regional Director of the Office of Surface Mining in accordance with the regulations in 30 CFR Chapter VII. Exploration plans for leased lands not covered by an approved mining permit shall be submitted to the District Mining Supervisor in accordance with the regulations in 30 CFR 211.

Sec. 10. MINING PLAN—In accordance with the regulations in 30 CFR 211 and Chapter VII, the lessee shall submit a mining and reclamation plan not more than three years after the effective date of this lease. Mining operations shall not commence until after the mining and reclamation plan is approved. The mining and reclamation shall be conducted in accordance with the approved mining and reclamation plan. Exploration activities which were not included in the approved mining and reclamation plan require submittal of exploration plans in accordance with Section 9 of this lease.

Sec. 11. LOGICAL MINING UNIT (LMU)—This lease is not automatically an LMU. At the request of the lessee or at the direction of the District Mining Supervisor, this lease shall become an LMU, subject to the provisions set forth in 30 CFR 211. If the LMU of which this lease is a part is dissolved, the lease will not automatically be

terminated unless requested in writing by the lessee to the appropriate office of the Bureau of Land Management or directed in writing by the District Mining Supervisor.

Sec. 12. OPERATIONS ON LEASED LANDS—(a) In accordance with conditions of this lease, the exploration and mining and reclamation plans, the permit issued pursuant to 30 CFR Chapter VII, and all applicable acts and regulations, the lessee shall exercise reasonable diligence, skill, and care in all operations on leased lands. (b) The lessee shall minimize to the maximum extent possible wasting of the coal deposits and other mineral and nonmineral resources, including, but not limited to, surface resources which may be found in, upon, or under such lands.

Sec. 13. SPECIAL STATUTES—The lessee shall comply with the provisions of the Federal Water Pollution Control Act (33 U.S.C. 1151-1175) and the Clean Air Act (42 U.S.C. 7401 et seq.).

Sec. 14. AUTHORIZATION OF OTHER USES AND DISPOSITION OF LEASED LANDS—(a) The lessor reserves the right to authorize other uses of the leased lands by regulation or by issuing, in addition to this lease, leases, licenses, permits, easements, or rights-of-way, including leases for the development of minerals other than coal under the Act. The lessor may authorize any other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee, and the lessee shall make all reasonable efforts to avoid interference with such authorized uses.

(b) The lessor reserves the right (i) to sell or otherwise dispose of the surface of the leased lands under existing law or laws hereafter enacted insofar as said surface is not necessary to the use of the lessee in the extraction and removal of the coal therein, or (ii) to dis-

pose of any resource in such lands if such disposal will not unreasonably interfere with the exploration and mining operations of the lessee.

(c) If the leased lands have been or shall hereafter be disposed of under laws reserving to the United States the deposits of coal therein, the lessee shall comply with all conditions as are or may hereafter be provided by the laws and regulations reserving such coal.

Sec. 15. EQUAL OPPORTUNITY CLAUSE—The lessee will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and the rules, regulations and relevant orders of the Secretary of Labor.

Sec. 16. CERTIFICATION OF NONSEGREGATED FACILITIES—By entering into this lease, the lessee certifies that he does not and will not maintain or provide for his employees any segregated facilities at any of his establishments, and that he does not and will not permit his employees to perform their services at any location under his control where segregated facilities are maintained. The lessee agrees that a breach of this certification is a violation of the Equal Opportunity clause of this lease. As used in this certification, the term "segregated facilities" means, but is not limited to, any waiting rooms, work areas, rest rooms, and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, color, religion, or national origin, because of habit, local custom, or otherwise. Lessee further agrees that (except where lessee has obtained identical certifications from proposed contractors and subcontractors for specific time periods) lessee will obtain identical certifications from proposed contractors and subcontractors prior to award of contracts or sub-

contracts exceeding \$10,000 which are not exempt from the provisions of the Equal Opportunity clause; that lessee will retain such certifications in lessee's files; and that lessee will forward the following notice to such proposed contractors and subcontractors (except where proposed contractors or subcontractors has submitted identical certifications for specific time periods). Notice to prospective contractors and subcontractors of requirement for certification of non-segregated facilities. A *Certification of Nonsegregated Facilities*, as required by the May 9, 1967, order (32 F.R. 7439, May 19, 1967) on *Elimination of Segregated Facilities*, by the Secretary of Labor, must be submitted prior to the award of a contract exceeding \$10,000 which is not exempt from the provisions of the Equal Opportunity clause. Certification may be submitted either for each contract and subcontract or for all contracts and subcontracts during a period (i.e., quarterly, semiannually, or annually).

Sec. 17. EMPLOYMENT PRACTICES—The lessee shall pay all wages due persons employed on the leased lands at least twice each month in lawful money of the United States. The lessee shall grant all miners and other employees complete freedom to purchase goods and service of their own choice. The lessee shall restrict the workday to not more than 8 hours in any one day for underground workers, except in case of emergency. The lessee shall employ no person under the age of 16 years in any mines below the surface. If the laws of the State in which the lands are situated conflict with this paragraph, then the State laws apply.

Sec. 18. MONOPOLY AND FAIR PRACTICES—The lessor reserves full authority to promulgate and enforce orders and regulations under the provisions of Sections 30 and 32 of the Act (30 U.S.C. Sections 187 and 189) necessary to insure that any sale of the production from the leased lands to the United States or to the public is at reasonable prices, to prevent monopoly, and to safe-

guard the public welfare, and such orders and regulations shall upon promulgation be binding upon the lessee.

Sec. 19. TRANSFERS—

- ☒ This lease may be transferred in whole or in part to any person, association or corporation qualified under 43 CFR 3472.1-1 to hold a lease.
- ☐ This lease may only be transferred in whole or in part to another public body, or to a person who will mine the coal on behalf of and for the use of the public body, or to a person for the limited purpose of creating a security interest in favor of a lender who agrees to be obligated to mine the coal on behalf of the public body. The transferee must be qualified under 43 CFR 3472.
- ☐ This lease may only be transferred in whole or in part to other small businesses qualifying under 13 CFR 121 and 43 CFR 3472.2-2 (c).

Any transfer of this lease in whole or in part is subject to the procedures and requirements for approval in the relevant regulations in 43 CFR 3400. A transfer will become effective on the first day of the month following its approval by the authorized officer, or, if the transferee requests, the first day of the month of the approval.

Sec. 20. RELINQUISHMENT OF LEASE—The lessee may file a relinquishment of the entire lease, a legal subdivision or aliquot part thereof, but not less than 10 acres, or any bed of the coal deposits therein. The relinquishment shall be filed in triplicate with the authorized officer. Upon the determination by the authorized officer that the public interest shall not be impaired, that all accrued rentals and royalties have been paid and that all of the obligations of the lessee under the regulations and the lease terms have been met, the relinquishment shall be accepted effective the date filed.

Sec. 21. NONCOMPLIANCE—Any failure to comply with the conditions of this lease, the approved exploration and mining and reclamation plans, the regulations, or applicable acts shall be dealt with in accordance with the procedures set forth in the regulations.

Sec. 22. WAIVER OF CONDITIONS—The lessor reserves the right to waive any breach of the conditions contained in this lease, except the breach of such conditions as are required by the Act, but any such waiver shall extend only to the particular breach so waived and shall not limit the rights of the lessor with respect to any future breach; nor shall the waiver of a particular breach prevent cancellation of this lease for any other cause, or for the same cause occurring at another time.

Sec. 23. READJUSTMENT OF TERMS AND CONDITIONS—(a) The lease is subject to readjustment on the 20th year after the effective date and on each 10th year thereafter. In order that the lease may be readjusted as close as possible to the dates when it becomes subject to readjustment the lessor may propose the terms of readjustment of any conditions of this lease, including rental and royalty rates, before the 20th year after the effective date and before each 10-year interval thereafter. The authorized officer shall notify the lessee whether he intends to readjust the terms and conditions of the lease and, if he intends to readjust, the nature of the readjustments in accordance with the regulations in 43 CFR 3451. Unless the lessee, within 60 days after receipt of the proposed readjusted terms, files with the lessor an objection to the proposed readjusted conditions or relinquishes the lease as of the effective date of the readjustment, the lessee shall be deemed conclusively to have agreed to such conditions.

(b) If the lessee files objections to the proposed readjusted conditions, the existing conditions shall remain in effect until there has been an agreement between the lessor and the lessee on the new conditions to be incorpo-

rated in the lease, or until the lessee has exhausted his rights of appeal under Section 29 of this lease, or until the lease is relinquished, except that the authorized officer may provide in the notice of readjusted lease terms that the readjustment or any part thereof is effective pending the outcome of the appeal. If the readjusted royalty provisions are subsequently rescinded or amended, the lessee shall be permitted to credit any excess royalty payments against royalties subsequently due to the lessor.

Sec. 24. DELIVERY OF PREMISES—Upon termination of this lease for any reason, or relinquishment of a part of this lease, lessee shall deliver to the lessor in good order and condition all or the appropriate part of the leased lands. Delivery of the leased lands shall include underground timbering and such other supports and structures as are necessary for the preservation of the mine or deposit, and shall be in accordance with all other applicable provisions of the regulations including 30 CFR 211 and Chapter VII, for the completion of operations and abandonment.

Sec. 25. PROPRIETARY INFORMATION—Geological and geophysical data and information, including maps, trade secrets, and commercial and financial information which the lessor obtains from the lessee shall be treated in accordance with 43 CFR Part 2, 30 CFR 211.6 and other applicable regulations. Total lease reserve figures developed from this information will not be confidential.

Sec. 26. LESSEE'S LIABILITY TO LESSOR—(a) The lessee shall be liable to the United States for any damage suffered by the United States in any way arising from or connected with the lessee's activities and operations under this lease, except where damage is caused by employees of the United States acting within the scope of their authority.

(b) The lessee shall indemnify and hold harmless the United States from any and all claims arising from or

connected with the lessee's activities and operations under this lease.

(c) In any case where liability without fault is imposed on the lessee pursuant to this section, and the damages involved were caused by the action of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damages occurred.

Sec. 27. INSPECTIONS AND INVESTIGATIONS—(a) All books and records maintained by the lessee showing information required by this lease or regulations must be kept current and in such manner that the books and records can be readily checked at the mine, upon request, by the Regional Director or District Mining Supervisor or their representative.

(b) The lessee shall permit any duly authorized officer or representative of the lessor at any reasonable time (1) to inspect or investigate the leased lands, the exploration and mining and reclamation operations, and all surface and underground improvements, works, machinery, and equipment, and all books and records pertaining to the lessee's obligations to the lessor under this lease and regulations and (2) to copy, and make extracts from any such books and records.

Sec. 28. UNLAWFUL INTEREST—No member of, or Delegate to Congress, or Resident Commissioner, after his election or appointment, either before or after he has qualified and during his continuance in office, and no officer, or employee of the Department of the Interior, except as provided in 43 CFR 7.4(a)(3), shall hold any share or part in this lease or derive any benefit therefrom. The provisions of Section 3741 of the Revised Statutes, as amended, 41 U.S.C. Section 22, and the Act of June 25, 1948, 62 Stat. 702, as amended, 18 U.S.C. Sections 431-433, relating to contracts enter, into and

form a part of this lease insofar as they may be applicable.

Sec. 29. APPEALS—The lessee shall have the right of appeal (a) under 43 CFR 30004 from an action or decision of any official of the Bureau of Land Management (b) under 30 CFR Part 290 from an action, order, or decision of any official of the United States Geological Survey, or (c) under applicable regulation from any action or decision of any other official of the Department of the Interior or arising in connection with this lease, including any action or decision pursuant to Section 23 of this lease with respect to the readjustment of conditions.

Sec. 30. SPECIAL STIPULATIONS—In addition to observing the general obligations and standards of performance set out in the current regulations, the Lessee shall comply with and be bound by the following special stipulations. These stipulations are also imposed upon the lessee's agents and employees. The failure or refusal of any of these persons to comply with these stipulations shall be deemed a failure of the lessee to comply with the terms of this lease. The Lessee shall require his agents, contractors and subcontractors involved in activities concerning this lease to include these stipulations in the contracts between and among them. These stipulations may be revised or amended, in writing, by the mutual consent of the Lessor and the Lessee at any time to adjust to changed conditions or to correct an oversight. The Lessor may amend these stipulations at any time without the consent of the Lessee in order to make them consistent with any new federal or state statutes and the regulations promulgated under authority of new statutes.

(a) Cultural Resources (1) Before undertaking any activities that may disturb the surface of the leased lands, the lessee shall conduct a cultural resource intensive field inventory in a manner specified by the authorized officer of the BLM or of the surface managing

agency (if different) on portions of the mine plan area and adjacent areas, or exploration plan area, that may be adversely affected by lease-related activities and which were not previously inventoried at such a level of intensity. The inventory shall be conducted by a qualified professional cultural resource specialist (i.e., archeologist, historian or historical architect, as appropriate, approved by the authorized officer of the surface managing agency (BLM if the surface is privately owned), and a report of the inventory and recommendations for protecting any cultural resources identified shall be submitted to the Regional Director of the Office of Surface Mining (or the District Mining Supervisor if activities are associated with coal exploration outside an approved mining permit area) and the authorized officer of the BLM or the surface managing agency (if different). The lessee shall undertake measures, in accordance with instructions from the Regional Director (or the District Mining Supervisor if activities are associated with coal exploration outside an approved mining permit area), to protect cultural resources on the leased land. The lessee shall not commence the surface disturbing activities until permission to proceed is given by the Regional Director (or the District Mining Supervisor if activities are associated with coal exploration outside an approved mining permit area).

(2) The lessee shall protect all cultural resource properties within the lease area from lease-related activities until the cultural resource mitigation measures can be implemented as part of an approved mining and reclamation plan or exploration plan.

(3) The cost of conducting the inventory, preparing reports, and carrying out mitigation measures shall be borne by the lessee.

(4) If cultural resources are discovered during operations under this lease, the lessee shall immediately bring

them to the attention of the Regional Director (or the District Mining Supervisor if activities are associated with coal exploration outside an approved mining permit area), or the authorized officer of the surface managing agency if the Regional Director, or District Mining Supervisor, as appropriate, is not available. The lessee shall not disturb such resources except as may be subsequently authorized by the Regional Director (or the District Mining Supervisor if activities are associated with coal exploration outside an approved mining permit area). Within two (2) working days of notification, the Regional Director (or the District Mining Supervisor if activities are associated with coal exploration outside an approved mining permit area) will evaluate or have evaluated any cultural resources discovered and will determine if any action may be required to protect or preserve such discoveries. The cost of data recovery for cultural resources discovered during lease operations shall be borne by the surface managing agency unless otherwise specified by the authorized officer of the BLM or of the surface managing agency (if different).

(5) All cultural resources shall remain under the jurisdiction of the United States until ownership is determined under applicable law.

(b) Paleontological Resources. (1) Before undertaking any activities that may disturb the surface of the leased lands, the lessee shall contact the Bureau of Land Management to determine whether the authorized officer will require the lessee to conduct a paleontological appraisal of the mine plan and adjacent areas, or exploration plan areas, that may be adversely affected by lease-related activities. If the authorized officer determines that one is necessary, the paleontological appraisal shall be conducted by a qualified paleontologist approved by the authorized officer of the surface managing agency (BLM if the surface is privately owned), using the pub-

lished literature and, where appropriate, field appraisals for determining the possible existence of larger and more conspicuous fossils of scientific significance. A report of the appraisal and recommendations for protecting any larger and more conspicuous fossils of significant scientific interest on the leased lands so identified shall be submitted to the authorized officer of the surface managing agency (BLM if the surface is privately owned). When necessary to protect and collect the larger and more conspicuous fossils of significant scientific interest on the leased lands, the lessee shall undertake the measures provided in the approval of the mining and reclamation plan or exploration plan.

(2) The lessee shall not knowingly disturb, alter, destroy or take any larger and more conspicuous fossils of significant scientific interest, and shall protect all such fossils in conformance with the measures included in the approval of the mining and reclamation plan or exploration plan.

(3) The lessee shall immediately bring any such fossils that might be altered or destroyed by his operation to the attention of the Regional Director or the District Mining Supervisor, as appropriate. Operations may continue as long as the fossil specimen or specimens would not be seriously damaged or destroyed by the activity. The Regional Director or the District Mining Supervisor, as appropriate, shall evaluate or have evaluated such discoveries brought to his attention and, within five (5) working days, shall notify the lessee what action shall be taken with respect to such discoveries.

(4) All such fossils of significant scientific interest shall remain under the jurisdiction of the United States until ownership is determined under applicable law. Copies of all paleontological resource data generated as a result of the lease term requirements will be provided to the

Regional Director or the District Mining Supervisor, as appropriate.

(5) The cost of any required salvage of such fossils shall be borne by the United States.

(6) These conditions apply to all such fossils of significant scientific interest discovered within the lease area whether discovered in the overburden, interburden, or coal seam or seams.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

COAL LEASE READJUSTMENT

Serial Number W-061422

Lease Date March 1, 1963

This lease between the United States of America, the lessor through the Bureau of Land Management, and

FMC Corporation
P.O. Box 750
Kemmerer, Wyoming 83101

is readjusted effective as of March 1, 1983, the lessee.

Sec. 1. STATUTES AND REGULATIONS—This lease is issued pursuant and subject to the terms and provisions of the Mineral Leasing Act of February 25, 1920. 41 Stat. 437, as amended. 30 U.S.C. Sections 181-287 and 90 Stat. 1083-1092, hereafter referred to as the Act, and of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1201 et seq., and the Mineral Leasing Act for Acquired Lands of August 7, 1947, as amended, 30 U.S.C. 351-359 et seq. This lease is subject to all regulations of the Secretary of the Interior (including but not limited to 30 CFR Part 211 and Chapter VII and 43 CFR Group 3400) which are now in force or (except as expressly limited herein) hereafter in force, and all such regulations are made a part hereof. No amendment to the regulations made subsequent to the effective date hereof shall alter the rental and production royalty requirements in Sections 5 and 6 of this lease until the next readjustment of this lease.

WITNESSETH:

Sec. 2. RIGHTS OF LESSEE—The lessor, in consideration of rents and royalties and other conditions herein-

after set forth, hereby grants to the lessee the exclusive right and privilege to mine and dispose of all coal in the following described tracts (lease lands) situated in the State of Wyoming

T. 19 N., R. 117 W., 6th Principal Meridian, Lincoln County

sec. 4, lots 1, 2, S $\frac{1}{2}$ NE., SE $\frac{1}{4}$;

sec. 10, all.

T. 20 N., R. 117 W., 6th Principal Meridian, Lincoln County

sec. 28, E $\frac{1}{2}$;

sec. 34, all.

containing 1921.68 acres, more or less and, together with the right to construct all works, buildings, structures, equipment, and appliances which may be necessary and convenient for the mining and preparation of the coal for market, and, subject to the conditions herein provided, to use so much of the surface as may reasonably be required in the exercise of the rights and privileges herein granted for so long as this lease remains in full force and effect under any provisions of the law and the applicable regulations thereunder.

Sec. 3. DILIGENT DEVELOPMENT AND CONTINUED OPERATION—The lessee shall engage in the diligent development of the coal resources subject to the lease. After diligent development is achieved, the lessee shall maintain continued operation of the mine or mines on the leased lands. The terms diligent development and continued operation are defined in the applicable regulations in Titles 30 and 43 of the Code of Federal Regulations.

Sec. 4 BONDS—The lessee shall file with the appropriate Bureau of Land Management office a lease bond in the amount of \$5,000 for the use and benefit of the United States, to insure payment of rentals and royalties and to

insure compliance with all other terms of the lease, the regulations and the Act (except for reclamation within the area covered by a surface mining permit issued under the permanent regulatory program by the regulatory authority) and, if appropriate, for the protection of the interest of the surface owners on the leased lands. An increase in the amount of the lease bond may be required by the lessor at any time during the life of the lease to reflect changed conditions.

Sec. 5 RENTAL—An annual rental of \$3.00 for each acre or fraction thereof shall be paid in advance on or before each anniversary date of this lease. Rentals paid for any lease year commencing prior to the effective date of this readjustment shall be credited against royalties for that year. Rentals due and payable for any lease year commencing on or after the effective date of this readjustment may not be credited against royalties (43 CFR 347331).

Sec. 6 PRODUCTION ROYALTY—The lessee shall pay a production royalty of 12½ percent of the value of coal produced by strip or auger methods and 8 percent of the value of coal produced by underground mining methods. The value of coal shall be determined as set forth in 30 CFR 211. Production royalties paid for a calendar month shall be reduced by the amount of any advance royalties paid under this lease to the extent that such advance royalties have not been used to reduce production royalties in a previous month. However, production royalties payable after the 20th year of the lease shall not be reduced by advance royalties paid during the first 20 years of the lease. Production royalties shall be payable the final day of the month succeeding the calendar month in which the coal is sold, unless otherwise specified in 30 CFR 211.

Sec. 7 ADVANCE ROYALTY—Upon request by the lessee the District Mining Supervisor may accept, for a

total of not more than 10 years, the payment of advance royalties in lieu of continued operation consistent with the regulations in 43 CFR 3473 and 30 CFR 211. The advance royalty shall be based on a percent of the value of a minimum number of tons which shall be determined in the manner established by the regulations in 30 CFR 211.

Sec. 8 METHOD OF PAYMENTS—The lessee shall make rental payments to the appropriate Bureau of Land Management office until production royalties become payable. Thereafter, all rentals, production royalties and advance royalties shall be paid to the appropriate office of the United States Minerals Management Service.

Sec. 9 EXPLORATION PLAN—The lessee shall not commence any exploration, except casual use, on the leased lands without an approved exploration plan. Exploration plans for leased lands covered by an approved mining permit shall be submitted to the Regional Director of the Office of Surface Mining in accordance with the regulations in 30 CFR Chapter VII. Exploration plans for leased lands not covered by an approved mining permit shall be submitted to the District Mining Supervisor in accordance with the regulations in 30 CFR 211.

Sec. 10. MINING PLAN—In accordance with the regulations in 30 CFR 211 and Chapter VII, the lessee shall submit a mining and reclamation plan not more than three years after the effective date of this lease. Mining operations shall not commence until after the mining and reclamation plan is approved. The mining and reclamation shall be conducted in accordance with the approved mining and reclamation plan. Exploration activities which were not included in the approved mining and reclamation plan require submittal of exploration plans in accordance with Section 9 of this lease.

Sec. 11. LOGICAL MINING UNIT (LMU)—This lease is not automatically an LMU. At the request of the les-

see or at the direction of the District Mining Supervisor, this lease shall become an LMU, subject to the provisions set forth in 30 CFR 211. If the LMU of which this lease is a part is dissolved, the lease will not automatically be terminated unless requested in writing by the lessee to the appropriate office of the Bureau of Land Management or directed in writing by the District Mining Supervisor.

Sec. 12. OPERATIONS ON LEASED LANDS—(a) In accordance with conditions of this lease, the exploration and mining and reclamation plans, the permit issued pursuant to 30 CFR Chapter VII, and all applicable acts and regulations, the lessee shall exercise reasonable diligence, skill, and care in all operations on leased lands. (b) The lessee shall minimize to the maximum extent possible wasting of the coal deposits and other mineral and nonmineral resources, including, but not limited to, surface resources which may be found in, upon, or under such lands.

Sec. 13. SPECIAL STATUTES—The lessee shall comply with the provisions of the Federal Water Pollution Control Act (33 U.S.C. 1151-1175) and the Clean Air Act (42 U.S.C. 7401 et seq.).

Sec. 14. AUTHORIZATION OF OTHER USES AND DISPOSITION OF LEASED LANDS—(a) The lessor reserves the right to authorize other uses of the leased lands by regulation or by issuing, in addition to this lease, leases, licenses, permits, easements, or rights-of-way, including leases for the development of minerals other than coal under the Act. The lessor may authorize any other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee, and the lessee shall make all reasonable efforts to avoid interference with such authorized uses.

(b) The lessor reserves the right (i) to sell or otherwise dispose of the surface of the leased lands under ex-

isting law or laws hereafter enacted insofar as said surface is not necessary to the use of the lessee in the extraction and removal of the coal therein, or (ii) to dispose of any resource in such lands if such disposal will not unreasonably interfere with the exploration and mining operations of the lessee.

(c) If the leased lands have been or shall hereafter be disposed of under laws reserving to the United States the deposits of coal therein, the lessee shall comply with all conditions as are or may hereafter be provided by the laws and regulations reserving such coal.

Sec. 15. EQUAL OPPORTUNITY CLAUSE—The lessee will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and the rules, regulations and relevant orders of the Secretary of Labor.

Sec. 16. CERTIFICATION OF NONSEGREGATED FACILITIES—By entering into this lease, the lessee certifies that he does not and will not maintain or provide for his employees any segregated facilities at any of his establishments, and that he does not and will not permit his employees to perform their services at any location under his control where segregated facilities are maintained. The lessee agrees that a breach of this certification is a violation of the Equal Opportunity clause of this lease. As used in this certification, the term "segregated facilities" means, but is not limited to, any waiting rooms, work areas, rest rooms, and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, color, religion, or national origin, because of habit, local custom, or otherwise. Lessee further agrees that (except where lessee has obtained identical certifications from proposed contractors

and subcontractors for specific time periods) lessee will obtain identical certifications from proposed contractors and subcontractors prior to award of contracts or subcontracts exceeding \$10,000 which are not exempt from the provisions of the Equal Opportunity clause; that lessee will retain such certifications in lessee's files; and that lessee will forward the following notice to such proposed contractors and subcontractors (except where proposed contractors or subcontractors has submitted identical certifications for specific time periods). Notice to prospective contractors and subcontractors of requirement for certification of non-segregated facilities. A *Certification of Nonsegregated Facilities*, as required by the May 9, 1967, order (32 F.R. 7439, May 19, 1967) on *Elimination of Segregated Facilities*, by the Secretary of Labor, must be submitted prior to the award of a contract exceeding \$10,000 which is not exempt from the provisions of the Equal Opportunity clause. Certification may be submitted either for each contract and subcontract or for all contracts and subcontracts during a period (i.e., quarterly, semiannually, or annually).

Sec. 17. EMPLOYMENT PRACTICES—The lessee shall pay all wages due persons employed on the leased lands at least twice each month in lawful money of the United States. The lessee shall grant all miners and other employees complete freedom to purchase goods and service of their own choice. The lessee shall restrict the workday to not more than 8 hours in any one day for underground workers, except in case of emergency. The lessee shall employ no person under the age of 16 years in any mines below the surface. If the laws of the State in which the lands are situated conflict with this paragraph, then the State laws apply.

Sec. 18. MONOPOLY AND FAIR PRACTICES—The lessor reserves full authority to promulgate and enforce orders and regulations under the provisions of Sections 30 and 32 of the Act (30 U.S.C. Sections 187 and 189)

necessary to insure that any sale of the production from the leased lands to the United States or to the public is at reasonable prices, to prevent monopoly, and to safeguard the public welfare, and such orders and regulations shall upon promulgation be binding upon the lessee.

Sec. 19. TRANSFERS—

- ☒ This lease may be transferred in whole or in part to any person, association or corporation qualified under 43 CFR 3472.1-1 to hold a lease.
- ☐ This lease may only be transferred in whole or in part to another public body, or to a person who will mine the coal on behalf of and for the use of the public body, or to a person for the limited purpose of creating a security interest in favor of a lender who agrees to be obligated to mine the coal on behalf of the public body. The transferee must be qualified under 43 CFR 3472.
- ☐ This lease may only be transferred in whole or in part to other small businesses qualifying under 13 CFR 121 and 43 CFR 3472.2-2(c). —

Any transfer of this lease in whole or in part is subject to the procedures and requirements for approval in the relevant regulations in 43 CFR 3400. A transfer will become effective on the first day of the month following its approval by the authorized officer, or, if the transferee requests, the first day of the month of the approval.

Sec. 20. RELINQUISHMENT OF LEASE—The lessee may file a relinquishment of the entire lease, a legal subdivision or aliquot part thereof, but not less than 10 acres, or any bed of the coal deposits therein. The relinquishment shall be filed in triplicate with the authorized officer. Upon the determination by the authorized officer that the public interest shall not be impaired, that all accrued rentals and royalties have been paid and that all of the obligations of the lessee under the regulations and the lease terms have been met, the relinquishment shall be accepted effective the date filed.

Sec. 21. NONCOMPLIANCE—Any failure to comply with the conditions of this lease, the approved exploration and mining and reclamation plans, the regulations, or applicable acts shall be dealt with in accordance with the procedures set forth in the regulations.

Sec. 22. WAIVER OF CONDITIONS—The lessor reserves the right to waive any breach of the conditions contained in this lease, except the breach of such conditions as are required by the Act, but any such waiver shall extend only to the particular breach so waived and shall not limit the rights of the lessor with respect to any future breach; nor shall the waiver of a particular breach prevent cancellation of this lease for any other cause, or for the same cause occurring at another time.

Sec. 23. READJUSTMENT OF TERMS AND CONDITIONS—(a) The lease is subject to readjustment on the 20th year after the effective date and on each 10th year thereafter. In order that the lease may be readjusted as close as possible to the dates when it becomes subject to readjustment the lessor may propose the terms of readjustment of any conditions of this lease, including rental and royalty rates, before the 20th year after the effective date and before each 10-year interval thereafter. The authorized officer shall notify the lessee whether he intends to readjust the terms and conditions of the lease and, if he intends to readjust, the nature of the readjustments in accordance with the regulations in 43 CFR 3451. Unless the lessee, within 60 days after receipt of the proposed readjusted terms, files with the lessor an objection to the proposed readjusted conditions or relinquishes the lease as of the effective date of the readjustment, the lessee shall be deemed conclusively to have agreed to such conditions.

(b) If the lessee files objections to the proposed readjusted conditions, the existing conditions shall remain in effect until there has been an agreement between the lessor and the lessee on the new conditions to be incorpo-

rated in the lease, or until the lessee has exhausted his rights of appeal under Section 29 of this lease, or until the lease is relinquished, except that the authorized officer may provide in the notice of readjusted lease terms that the readjustment or any part thereof is effective pending the outcome of the appeal. If the readjusted royalty provisions are subsequently rescinded or amended, the lessee shall be permitted to credit any excess royalty payments against royalties subsequently due to the lessor.

Sec. 24. **DELIVERY OF PREMISES**—Upon termination of this lease for any reason, or relinquishment of a part of this lease, lessee shall deliver to the lessor in good order and condition all or the appropriate part of the leased lands. Delivery of the leased lands shall include underground timbering and such other supports and structures as are necessary for the preservation of the mine or deposit, and shall be in accordance with all other applicable provisions of the regulations including 30 CFR 211 and Chapter VII, for the completion of operations and abandonment.

Sec. 25. **PROPRIETARY INFORMATION**—Geological and geophysical data and information, including maps, trade secrets, and commercial and financial information which the lessor obtains from the lessee shall be treated in accordance with 43 CFR Part 2, 30 CFR 211.6 and other applicable regulations. Total lease reserve figures developed from this information will not be confidential.

Sec. 26. **LESSEE'S LIABILITY TO LESSOR**—(a) The lessee shall be liable to the United States for any damage suffered by the United States in any way arising from or connected with the lessee's activities and operations under this lease, except where damage is caused by employees of the United States acting within the scope of their authority.

(b) The lessee shall indemnify and hold harmless the United States from any and all claims arising from or

connected with the lessee's activities and operations under this lease.

(c) In any case where liability without fault is imposed on the lessee pursuant to this section, and the damages involved were caused by the action of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damages occurred.

Sec. 27. INSPECTIONS AND INVESTIGATIONS—(a)

All books and records maintained by the lessee showing information required by this lease or regulations must be kept current and in such manner that the books and records can be readily checked at the mine, upon request, by the Regional Director or District Mining Supervisor or their representative.

(b) The lessee shall permit any duly authorized officer or representative of the lessor at any reasonable time (1) to inspect or investigate the leased lands, the exploration and mining and reclamation operations, and all surface and underground improvements, works, machinery, and equipment, and all books and records pertaining to the lessee's obligations to the lessor under this lease and regulations and (2) to copy, and make extracts from any such books and record.

Sec. 28. UNLAWFUL INTEREST—No member of, or Delegate to Congress, or Resident Commissioner, after his election or appointment, either before or after he has qualified and during his continuance in office, and no officer, or employee of the Department of the Interior, except as provided in 43 CFR 7.4(a)(3), shall hold any share or part in this lease or derive any benefit therefrom. The provisions of Section 3741 of the Revised Statutes, as amended, 41 U.S.C. Section 22, and the Act of June 25, 1948, 62 Stat. 702, as amended, 18 U.S.C. Sections 431-433, relating to contracts enter, into and form a part of this lease insofar as they may be applicable.

Sec. 29. APPEALS—The lessee shall have the right of appeal (a) under 43 CFR 30004 from an action or decision of any official of the Bureau of Land Management (b) under 30 CFR Part 290 from an action, order, or decision of any official of the United States Geological Survey, or (c) under applicable regulation from any action or decision of any other official of the Department of the Interior or arising in connection with this lease, including any action or decision pursuant to Section 23 of this lease with respect to the readjustment of conditions.

Sec. 30. SPECIAL STIPULATIONS—In addition to observing the general obligations and standards of performance set out in the current regulations, the Lessee shall comply with and be bound by the following special stipulations. These stipulations are also imposed upon the lessee's agents and employees. The failure or refusal of any of these persons to comply with these stipulations shall be deemed a failure of the lessee to comply with the terms of this lease. The Lessee shall require his agents, contractors and subcontractors involved in activities concerning this lease to include these stipulations in the contracts between and among them. These stipulations may be revised or amended, in writing, by the mutual consent of the Lessor and the Lessee at any time to adjust to changed conditions or to correct an oversight. The Lessor may amend these stipulations at any time without the consent of the Lessee in order to make them consistent with any new federal or state statutes and the regulations promulgated under authority of new statutes.

(a) Cultural Resources (1) Before undertaking any activities that may disturb the surface of the leased lands, the lessee shall conduct a cultural resource intensive field inventory in a manner specified by the authorized officer of the BLM or of the surface managing agency (if different) on portions of the mine plan area and adjacent areas, or exploration plan area, that may

be adversely affected by lease-related activities and which were not previously inventoried at such a level of intensity. The inventory shall be conducted by a qualified professional cultural resource specialist (i.e., archeologist, historian or historical architect, as appropriate, approved by the authorized officer of the surface managing agency (BLM if the surface is privately owned), and a report of the inventory and recommendations for protecting any cultural resources identified shall be submitted to the Regional Director of the Office of Surface Mining (or the District Mining Supervisor if activities are associated with coal exploration outside an approved mining permit area) and the authorized officer of the BLM or the surface managing agency (if different). The lessee shall undertake measures, in accordance with instructions from the Regional Director (or the District Mining Supervisor if activities are associated with coal exploration outside an approved mining permit area), to protect cultural resources on the leased land. The lessee shall not commence the surface disturbing activities until permission to proceed is given by the Regional Director (or the District Mining Supervisor if activities are associated with coal exploration outside an approved mining permit area).

(2) The lessee shall protect all cultural resource properties within the lease area from lease-related activities until the cultural resource mitigation measures can be implemented as part of an approved mining and reclamation plan or exploration plan.

(3) The cost of conducting the inventory, preparing reports, and carrying out mitigation measures shall be borne by the lessee.

(4) If cultural resources are discovered during operations under this lease, the lessee shall immediately bring them to the attention of the Regional Director (or the District Mining Supervisor if activities are associated with coal exploration outside an approved mining permit area), or the authorized officer of the surface managing

agency if the Regional Director, or District Mining Supervisor, as appropriate, is not available. The lessee shall not disturb such resources except as may be subsequently authorized by the Regional Director (or the District Mining Supervisor if activities are associated with coal exploration outside an approved mining permit area). Within two (2) working days of notification, the Regional Director (or the District Mining Supervisor if activities are associated with coal exploration outside an approved mining permit area) will evaluate or have evaluated any cultural resources discovered and will determine if any action may be required to protect or preserve such discoveries. The cost of data recovery for cultural resources discovered during lease operations shall be borne by the surface managing agency unless otherwise specified by the authorized officer of the BLM or of the surface managing agency (if different).

(5) All cultural resources shall remain under the jurisdiction of the United States until ownership is determined under applicable law.

(b) Paleontological Resources. (1) Before undertaking any activities that may disturb the surface of the leased lands, the lessee shall contact the Bureau of Land Management to determine whether the authorized officer will require the lessee to conduct a paleontological appraisal of the mine plan and adjacent areas, or exploration plan areas, that may be adversely affected by lease-related activities. If the authorized officer determines that one is necessary, the paleontological appraisal shall be conducted by a qualified paleontologist approved by the authorized officer of the surface managing agency (BLM if the surface is privately owned), using the published literature and, where appropriate, field appraisals for determining the possible existence of larger and more conspicuous fossils of scientific significance. A report of the appraisal and recommendations for protecting any larger and more conspicuous fossils of significant scientific interest on the leased lands so identified shall be

submitted to the authorized officer of the surface managing agency (BLM if the surface is privately owned). When necessary to protect and collect the larger and more conspicuous fossils of significant scientific interest on the leased lands, the lessee shall undertake the measures provided in the approval of the mining and reclamation plan or exploration plan.

(2) The lessee shall not knowingly disturb, alter, destroy or take any larger and more conspicuous fossils of significant scientific interest, and shall protect all such fossils in conformance with the measures included in the approval of the mining and reclamation plan or exploration plan.

(3) The lessee shall immediately bring any such fossils that might be altered or destroyed by his operation to the attention of the Regional Director or the District Mining Supervisor, as appropriate. Operations may continue as long as the fossil specimen or specimens would not be seriously damaged or destroyed by the activity. The Regional Director or the District Mining Supervisor, as appropriate, shall evaluate or have evaluated such discoveries brought to his attention and, within five (5) working days, shall notify the lessee what action shall be taken with respect to such discoveries.

(4) All such fossils of significant scientific interest shall remain under the jurisdiction of the United States until ownership is determined under applicable law. Copies of all paleontological resource data generated as a result of the lease term requirements will be provided to the Regional Director or the District Mining Supervisor, as appropriate.

(5) The cost of any required salvage of such fossils shall be borne by the United States.

(6) These conditions apply to all such fossils of significant scientific interest discovered within the lease area whether discovered in the overburden, interburden, or coal seam or seams.

APPENDIX H

EXHIBIT E

FMC Corporation
Natural Resources Operation
Box 750
Kemmerer, Wyoming 83101
(307) 877-3916

February 11, 1983

FMC

Mr. Harold G. Stinchcomb
Chief of the Branch of Energy
Bureau of Land Management
United States Department of Interior
P.O. Box 1828
Cheyenne, WY 82003

Re: Readjustment of Coal Leases W-061421 & W-061422

Dear Mr. Stinchcomb:

On December 27, 1982, FMC Corporation received notice from your office of the proposed readjustment of federal coal leases W-061421 and W-061422. Also included were the proposed terms and conditions of the readjusted coal leases to be effective March 1, 1983. This letter is the formal objection of FMC Corporation to the Department of Interior's (Interior) proposed readjusted lease terms. This objection is being filed within the sixty-day protest period established by the Bureau of Land Management decision. The bases for this objection are set forth in detail below. This letter should not be construed as a surrender or a relinquishment of the two federal coal leases or any rights thereunder.

FMC Corporation objects to the proposed increase of the production royalty from 17½ cents per ton to 12½ per-

cent of value and to the advance royalty requirement as currently constituted.

SPECIFIC OBJECTION TO PROPOSED READJUSTMENT OF PRODUCTION ROYALTY

1. *Nonapplicability of FCLAA to existing leases.*

The Federal Coal Leasing Amendments Act do not, and were not intended to, apply to federal coal leases issued prior to August 4, 1976. There is no express statutory language dealing with leases in existence prior to that date. FMC's leases were issued on March 1, 1963. Interior has erroneously interpreted the FCLAA to apply to readjustment of existing leases occurring after August 4, 1976. This is inconsistent with the legislative history and intent of the Act. As noted above, the statute does not specifically deal with existing leases. However, Congress specifically rejected a proposed amendment to the Act which would have imposed the 12½ percent minimum statutory royalty rate on pre-1976 leases. 124 Congressional Record S 1561-3 (Daily Ed. Sept. 20, 1978). In addition, a statute will not be interpreted to have retroactive application unless that legislative intent is clearly stated. Therefore, to the extent that Interior is imposing a 12½ percent production royalty because of its interpretation of the requirements of the statute, its actions are not founded in law.

2. *FMC is only subject to regulations in force at the time of the execution of the lease.*

Lease Nos. W-061421 and W-061422 specify that they are subject to "all reasonable regulations of the Secretary of Interior *now in force*" (emphasis added). New regulatory requirements, such as 43 C.F.R. § 3451.1 requiring all pre-1976 leases to be readjusted to 12½ percent, do not apply to these leases pursuant to the terms thereof. This provision was an essential element of

FMC's acceptance of the lease and commencement of operations. Sound business judgements must be made based upon certainty specifically with regard to royalty costs. While it was recognized that those costs could be "reasonably" readjusted, it was not contemplated by FMC that it would be subject to new regulations excessively increasing the royalty. These leases were issued with an indeterminate term, subject to periodic readjustment and represent a commercial relationship between FMC and Interior which cannot be unilaterally altered in a material manner.

3. Readjustment must be reasonable.

Section 3D of these leases reserve to the United States the right to "reasonably readjust and fix royalties." An increase from 17½ cents per ton to 12½ percent of value is an unreasonable increase resulting in an unacceptable economic burden on the leases and is not in compliance with the lease terms. This excessive increase is not based upon any factual evaluation of the mining operation to determine the appropriate royalty. Factors that should be evaluated include geologic circumstances, attendant higher production costs, and the market price of production. In addition, changing from a certain amount per ton of coal to a percent of value unfairly penalizes the high-cost producer and results in the payment of royalty on severance, and other taxes.

4. The proposed production royalty increase is an unconstitutional taking of property without compensation.

The imposition of the 12½ percent royalty, which increases the royalty over 1000%, some six years after the operations have commenced and the investments made in the mining operation, may render the lease uneconomic and deprive FMC of its investment without compensation.

5. *The 12½ percent production royalty fails to consider the unique nature of FMC's special bituminous coal mine.*

FMC's Skull Point Mine is a surface operation mining numerous seams of steeply dipping coal, (approximately 22° dip). The result of this geologic condition is substantially increased mining costs as the operation goes deeper, thus affecting the amount of coal which can be economically removed by the operation. The amount of coal produced by the operation will be significantly limited by the increased cost of production as the mine deepens. The 12½ percent production royalty will restrict the total volume of coal produced. Consequently, an excessive royalty rate will cause less federal coal to be produced. This is not in the public interest nor in the interest of FMC Corporation.

Congress recognized the unique nature of this mine by designating it a special bituminous coal mine pursuant to the Surface Mining Control and Reclamation Act. Congress created an exemption from this statute allowing less stringent reclamation standards because of the excessive costs required to reclaim this type of operation. Section 527 of the Act sets out the specific qualifications for special bituminous mines. It is recognized that only two such mines exist. The regulations adopted pursuant to § 527 specify that these mines are located in Wyoming. It is common knowledge that these special bituminous mines include the Kemmerer Coal Company mine and the FMC Skull Point mine in Lincoln County, Wyoming. Consequently, recognition of the unique problems of special bituminous mines and readjustment of the production royalty to accommodate these problems, will have no impact on Interior's readjustment of other coal leases.

FMC is specifically requesting that Interior develop an appropriate royalty rate for special bituminous coal mines which considers the increased mining costs and

the encouragement of maximum economic recovery of federal coal. FMC intends to provide Interior as soon as possible with specific documentation of the increased coal production that will result from a lower royalty rate.

6. *The proposed readjustment of the royalty rate will place the FMC Skull Point operation at a competitive disadvantage.*

Because of Interior's failure to readjust the adjacent coal leases of Kemmerer Coal Company, FMC will be placed at an extreme competitive disadvantage by the proposed readjustment. The Kemmerer Coal Company mine and the FMC Skull Point mine are located in close proximity and serve the same customers. They are both special bituminous mines, and experience similar mining costs. The Kemmerer Coal Company mine, however, will enjoy a 17½ cents per ton royalty until at least 1989. If FMC's leases are readjusted, an unacceptable economic disadvantage will result.

7. *Extreme increases in production royalty are inflationary.*

An increase from 17½ cents per ton to 12½ percent of value constitutes over a 1000% increase. This adds unacceptably to the cost of coal production and the ultimate cost to the consumer. Increasing energy costs are one of the major causes of inflation.

FULL CREDIT SHOULD BE GIVEN FOR ADVANCE ROYALTIES PAID ON FEDERAL COAL LEASES

Section 7 of the proposed readjusted coal lease provides that advance royalties may be credited against production royalties. FMC objects to the payment of advance royalties on the federal coal leases which are part of its ongoing operation. Such advance royalties are unnecessary to assure the federal government that its coal will

be produced. Interior can examine the approved mine plan of FMC Corporation and determine that both fee and federal coal are included within that plan. The mine cannot be developed without mining both fee and federal coal. However, there will be times when the operation is occurring solely on fee coal. Imposing the advance royalty will unnecessarily burden the operation without a corresponding benefit to the Federal government.

If an advance royalty is in fact imposed, it should be clarified that the intent of Section 7 is to credit all advance royalties paid, with no maximum limit, against production royalties incurred.

Although FMC does not intend to waive any of its rights to challenge the proposed readjustment or to appeal the readjustment on any basis, FMC believes that it might be beneficial to the parties to further negotiate the terms and condition of any proposed readjustment in light of the objections made herein. To this end, FMC requests a meeting with appropriate BLM officers to discuss the terms and conditions at the earliest possible date.

Respectfully submitted,

FMC Corporation

/s/ John V. Corra
JOHN V. CORRA
Resident Manager

126a

EXHIBIT H

FMC Corporation
Natural Resources Operation
Box 750
Kemmerer, Wyoming 83101
(307) 877-3916

FMC

June 2, 1983

Mr. Thomas Walker
Acting Division Chief
for Solid Mineral Leasing
Department of the Interior
Room 3610
18th & C St., N.W.
Washington, D.C. 20240

Re: Readjustment of Coal Leases W-061421 and W-061422

Dear Mr. Walker:

FMC Corporation, as a follow-up to our previous discussions with your staff concerning the readjustment of our federal coal leases, would like to provide you with a more detailed discussion of our problem and, at your staff's suggestion, pursue an administrative solution with the Department of Interior. As you know, we have appealed the State Office's denial of our protest of the proposed readjustment to the IBLA. The State Office arbitrarily imposed the 12½% royalty believing the law required this royalty for all strip mines. FMC's Skull Point Mine is not a strip mine, but is, instead, a unique special bituminous mine requiring unique royalty treatment. We are hopeful that our informal discussions with Interior will be successful in developing such a royalty and that the appeal can be dismissed. Since some of the information contained in this letter is of strategic

importance to FMC, we would respectfully request that this material be treated as confidential.

To provide you with a complete picture of our problem, we will describe the area in which the mine is located, the history of the development of the mine, the characteristics of the mine which cause it to be designated a special bituminous coal mine, and how those characteristics affect mine development. We will also explain how the proposed readjusted royalty, as applied to this mine, creates a unique economic burden which reduces the amount of federal coal that will be mined.

I. Description of the Area and History of Development of the Skull Point Mine

The FMC Skull Point Mine is the most recent mine in an area where coal mining has been an essential part of the economy for over a century. Coal mining in the Kemmerer, Wyoming area began in the late 1870's with the opening of mines by the Smith and Bell brothers near Hodges Pass north of Kemmerer. Additional mines supplying coal to the Union Pacific Railroad began operating in 1881 and other mines were opened in Diamondville by 1894. The Kemmerer Coal Company was formed in 1897 and has been producing coal from underground and surface mines in the Kemmerer area continuously since that time. The Kemmerer Coal Company began surface mining operations in 1950 on private lands and federal leases north of and adjacent to the FMC Skull Point Mine. Please see the Location Map, which is attached to this letter. Federal coal leases under lease numbers W-055246, W-056471, and W-60274 were issued to Kemmerer Coal Company in 1958, 1962, and 1963. In 1982, these leases were assigned to the Pittsburgh and Midway Coal Company through their purchase of Kemmerer Coal Company. These leases, together with mining rights on interspersed private lands, are contiguous to lands on which FMC has held private coal rights and federal coal leases since 1963.

During the 1950's, FMC entered into a joint venture with U.S. Steel Co. to manufacture metallurgical coke from bituminous coal. Wyoming was selected as the site due to the ability of coal in sufficient quantity and quality to satisfy the project demands. Both FMC and U.S. Steel operated mineral processing plants utilizing coke with reasonable rail transport distances from Kemmerer. Once the Kemmerer site was selected, exploration for unleased coal deposits in the immediate area began with the hopes of finding mineable quantities of coal for the coking operation.

This exploration began in the summer of 1958 under coal prospecting permits W-060240, W-060241 and W-060242. The latter two permits were for the federal coal leases presently held by FMC. These prospecting permits were extended to December 1, 1962 and converted to preference rights leases on March 1, 1963. On January 28, 1960, a coal license agreement was entered into with the Rocky Mountain Energy Company (a subsidiary of Union Pacific) providing FMC the right to the adjacent fee coal on Section 27, T20N, R117W, 6th P.M.

During the 1960's FMC developed plans for mining coal from these properties and transporting it to the FMC coking operation some 2.5 miles northeast of the mine. However, mine development was delayed because it did not appear, at that time, to warrant the capital investment required to conduct this mining operation.

During 1971, FMC realized that natural gas supplies to its Wyoming Trona Ore Mining and Processing Operation at Green River, Wyoming, would become both very expensive and difficult to obtain in the quantities required. In early 1972, the decision was made to convert to coal fired boilers for the Green River Plant's energy needs. The cost of this conversion was estimated at \$70,000,000 and a major factor in making this decision was the presence of the abundant coal reserves held by FMC located approximately fifty rail miles away.

These boilers required approximately 500,000 tons of coal per year and were to be operational by 1976. During the early 1970's, alternative coal supplies were examined and the possibility of exchanging FMC's Kemmerer properties for coal properties closer to the Green River Plant was studied. Additional private lands controlled by the Union Pacific Railroad, interspersed among the FMC federal lease areas, had to be acquired before FMC was prepared to commit totally to its Kemmerer coal mining venture.

However, the existing agreement with Rocky Mountain Energy on Section 27 stipulated that mining had to begin by December 31, 1974. This fact, coupled with the apparent cost savings and assured coal supplies inherent in mining the FMC leases, led, in early 1974, to the final decision to develop the mine at Skull Point. Morrison-Knudsen was selected as the mine contractor and the permitting process began. Stripping operations commenced in June of 1976 and coal shipments began in October of the same year. Since that time the mine has grown to a nominal annual production of 1,000,000 tons of coal, 75% of which is consumed by FMC's Kemmerer and Green River Plants.

The current mining permit calls for a production rate of 1.5 million tons per year. This volume allows an increased strip ratio which in turn maximizes the recovery of coal reserves.

II. *Designation of the Skull Point Mine as a Special Bituminous Coal Mine.*

The coal seams being mined at Skull Point dip steeply creating unique mining conditions. A deep pit affecting relatively little surface area results. Consequently, reclamation requires double handling of substantial volumes of overburden significantly increasing mining costs. Recognizing this unique problem, which is experienced by only two mines in the country, Congress created a special

exemption from the reclamation requirements of the federal Surface Mining Control and Reclamation Act of 1977 for mines meeting the criteria of the Act. (Section 527 of the SMCRA).

The Skull Point mine meets these special bituminous criteria as follows:

— A. *Sec. 527(a)(1)*: "the excavation of the specific mine pit takes place on the same relatively limited site for an extended period of time."

The proposed expansion proposes mining to a maximum depth of 750' from a pit of 355 acres in area over a period of approximately 20 years. This amounts to 18 acres of excavation annually which will yield approximately 9.3 million bank cubic yards (BCY) of material per year. This is equivalent to 320 vertical feet to every square foot of pit surface. In comparison, the average Wyoming strip mine is much shallower.

B. *Sec. 527(a)(2)*: "the excavation of the specific mine pit follows a coal seam having an inclination of 15° or more from the horizontal, and continues in the same area proceeding downward with lateral expansion of the pit necessary to maintain stability or as necessary to accommodate the orderly expansion of the total mining operation."

Coal seams at Skull Point dip from 20° to 22° from the horizontal. In order to have a safe high-wall, and mine to a depth of 750', lateral expansion perpendicular to the strike of the seam is essential.

C. *Sec. 527(a)(3)*: "the excavation of the specific mine pit involves the mining of more than one coal seam and mining has been initiated on the deepest coal seam contemplated to be mined in the current operation."

Coal seams, dipping 20°-22°, are presently deemed to be mineable in the proposed 355 acre pit. The

first coal shipped in 1976 was mined from the No. 1L seam, the deepest coal seam.

D. *Sec. 527(a)(4)*: "the amount of material removed is large in proportion to the surface area disturbed."

Approximately 25,000,000 tons of coal will be shipped under the proposed mine expansion. Approximately 133,000,000 BCY of overburden will be handled during this operation from within a mine pit of 355 acres. Of the total overburden roughly 73,000,000 BCY will be handled in-pit.

E. *Sec. 527(a)(5)*: "there is no practicable alternative method of mining the coal involved."

The techniques for mining steep seams such as these with underground methods are not available. If they are developed, coal extraction could be limited to roughly 60% due to the necessity of leaving protecting pillars for roof stability.

F. *Sec. 527(a)(6)*: "there is no practicable method to reclaim the land in the manner required by this Act."

The ultimate reclamation liability creates such a financial hardship that mining to any reasonable depth is precluded. A dramatic reserve loss is the result.

G. *Sec. 527(a)(7)*: Operations in existence on or before January 1, 1972, are classified as "existing special bituminous coal mines." In *Sec. 527(b)*, reference is made to "new special bituminous coal mines" which may be developed after August 3, 1977.

Since mining operations started at Skull Point in mid-1976 the FMC operation would have been denied special regulatory treatment enjoyed by special bituminous mines even though it met all the criteria set forth in Section 527(a). Through the Cooperative Agreement between the OSM and the State of Wyoming this oversight was corrected and the Skull Point Mine was classified as Special Bituminous.

III. *Special Bituminous Mine Design*

The first step in the mine design process is to define the maximum economic pit boundary. In order to accomplish this task, the coal deposit is divided into a series of vertical cross sections. One of these sections is shown in Figure 1. Referring to this cross section, it can be seen that as the highwall location is incrementally moved to the right, the pit gets deeper. As the pit deepens, the cost of mining the coal and stripping overburden increase. The criterion used to determine the final highwall location is the break-even strip ratio. In its simplest terms, it means that the coal in the last increment must pay for itself, with zero profit to the company. To proceed further down dip on the seam would create a "loss position." Conversely, to stop at some point up-dip would decrease the amount of mined coal and the operation would fall short of maximum economic recovery. This break-even point is calculated for each vertical cross section along the entire strike length of the geological defined coal deposit. Through the use of a computer, these sections and associated "final highwalls" are combined to yield a total mineable coal reserve.

The special high-cost nature of this mining operation, recognized by Congress, makes it difficult for FMC to compete in the coal market. Although the return on investment is adequate now, a 12½% royalty rate on federal coal would wipe out the return unless severe cost reduction measures were taken. In a special bituminous mine, such reductions require a reduced stripping ratio which, in turn, results in a loss of mineable coal reserves.

The strip ratio is a measure of how much overburden volume must be moved to uncover a ton of coal. In a classic strip operation, this ratio stays constant over the life of the mine since the coal seam is flat. Stripping costs also stay constant as there is either no overburden haulage, or a fixed haul distance. In contrast, for special bituminous coal mine operations with dipping seams, the

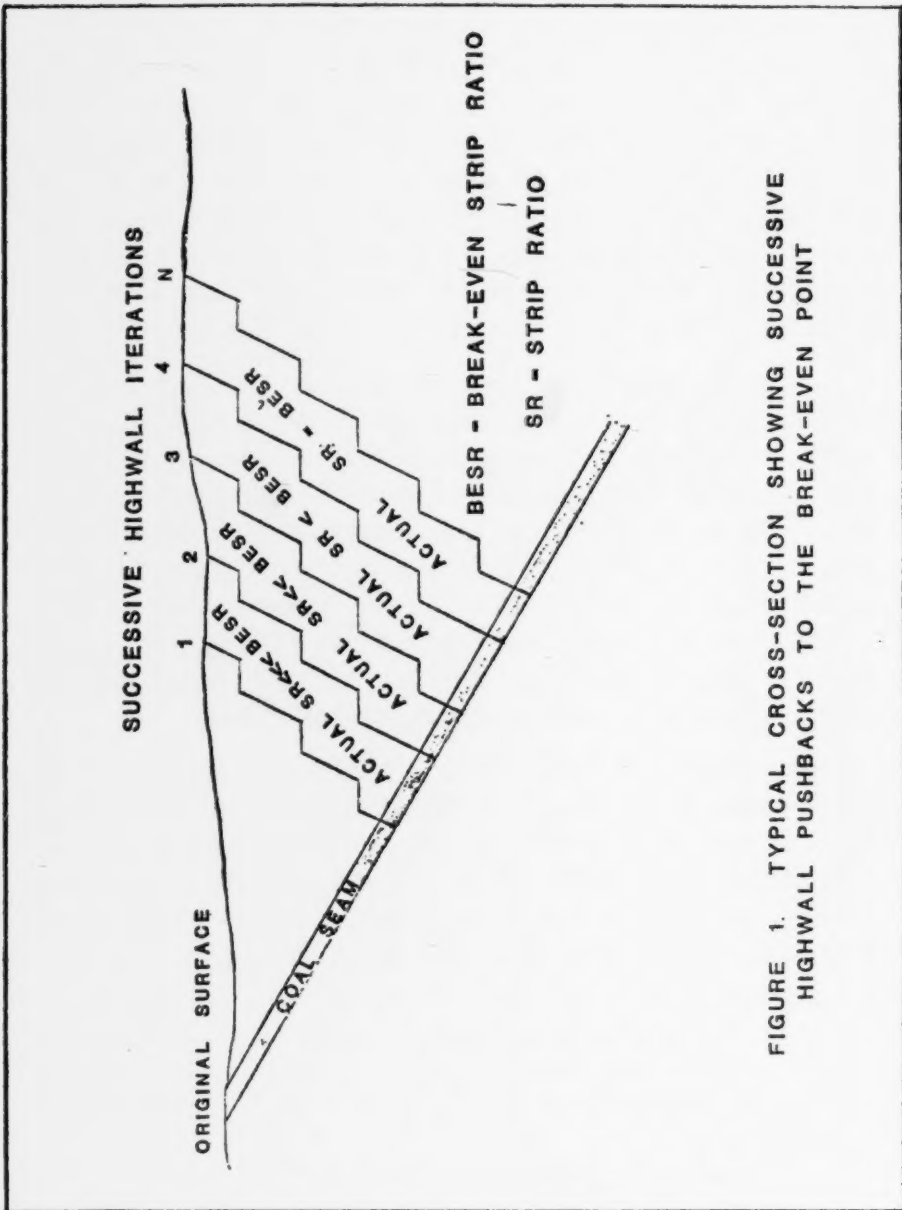


FIGURE 1. TYPICAL CROSS-SECTION SHOWING SUCCESSIVE HIGHWALL PUSHBACKS TO THE BREAK-EVEN POINT

amount of overburden that is removed to recover a ton of coal increases as the pit gets deeper. Consequently, stripping costs increase. This is due to the requirement that all overburden must be taken out of the pit and stored in a spoil pile. It is unavoidable that the overburden haul distance steadily increases over the life of the mine. The illustration of Figure 2 depicts these two different styles of mining. It is worthwhile to note that the method of mining special bituminous coal mines is identical to that used in open pit metal mines.

Stripping ratio is defined as the average amount of overburden, measured in bank cubic yards (BCY), that must be moved to recover one ton of coal. Presently, Skull Point is stripping at a 5:1 ratio. Operating at this ratio, the mine generates the necessary cash flow to assure continued mining. This average ratio takes into account the break-even ratios for the deepest coal, as well as the very low ratios for the coal near the outcrop. The mine is sequenced such that the "pre-stripping" of the high ratio areas is always being accomplished.

The break-even strip ratio (BESR) is calculated by assuming zero profit. In other words, the price received for the coal is exactly equal to the cost of mining. The cost of mining consists of overburden stripping, and coal mining and processing costs. The following hypothetical calculation illustrates the break-even theory.

Assumptions:

Coal Mining & Processing Cost	-\$ 4.00/ton
Overburden Stripping Cost	-\$ 1.50/ton
Selling Price of Coal	-\$20.00/ton

Formula:

$$\text{BESR} = \frac{\text{Selling Price} - \text{Coal Cost}}{\text{Overburden Cost}}$$

Calculation:

$$\frac{\text{BESR} = 20.00 - 4.00}{1.50}$$

$$\text{BESR} = 10.67:1$$

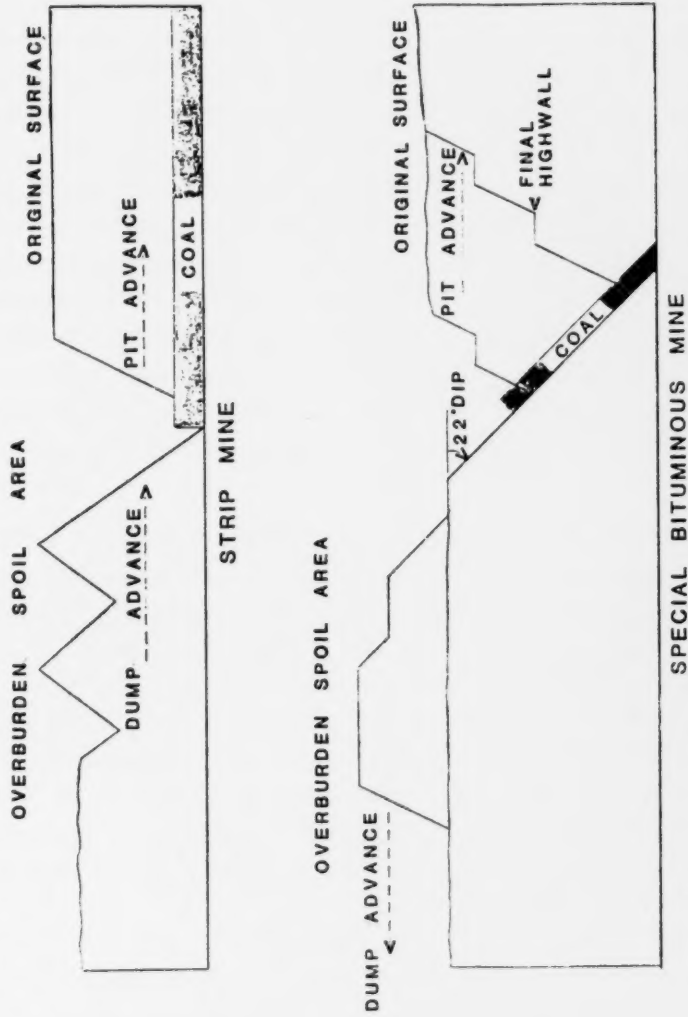


FIGURE 2. IDEALIZED CROSS-SECTIONS OF STRIP AND
SPECIAL BITUMINOUS (OPEN PIT) COAL MINES.

In this case, the final incremental highwall push back will have a ratio of 10.67 BCY of overburden per ton of coal. The current break-even ratio for Skull Point is approximately 8:1. During normal inflationary times, this ratio changes very little as prices tend to escalate proportionately with costs. However, if the price is reduced due to market forces beyond the mine's control, the ratio will decrease. An example of this can be found in the present day coal market where all producers are under severe pressure to lower prices. Likewise, a dramatic increase in costs would yield the same adverse effect, particularly if these costs can not be passed through to the consumer. Generally speaking, it is the uncontrollable costs of a specific nature, such as taxes and royalties, which result in lowered stripping ratios. General inflationary costs of efficient operations are normally acceptable in the marketplace.

Skull Point has a peculiar problem. Due to severe market pressures, the selling price of coal is declining. Compounding this problem is a future obligation to pay a much higher royalty rate on federal coal than anticipated when the mine was designed. The possibility of passing through a higher royalty rate is very slim since Skull Point's primary competitor is not obligated to pay higher royalties due to a governmental oversight (i.e., Rosebud decision). The inevitable result is to decrease the amount of coal mined on the property in accordance with the new break-even ratio.

IV. *Loss of Reserves Caused by Increased Royalty*

The mine property consists of two federal coal leases commingled with private lands on which FMC owns the mining rights. About one half of the total reserve (11.5 million tons) lies under federal land. It is this tonnage which will be affected by the newly applied 12½% royalty rate. Approximately 1 million tons of coal are produced annually with 75% being shipped to internal cus-

tomers, FMC's Green River trona and Kemmerer coke operations. Another 15% is sold under short term contract to a cement producer while the remainder is sold on the spot market. The only chance for a pass through is with the customer under contract. It would be a risky endeavor to pass through additional royalties due to the short term nature of this contract and the fact that the neighboring special bituminous mine does not have this royalty burden. The only plausible alternative is to reduce the amount of federal coal mined in accordance with the break-even strip ratio criterion. This is an unfortunate, but totally necessary decision. It is necessary because the mine cannot operate at zero profit. Furthermore, certain recent decisions by FMC (a Coke Plant expansion and a curtailment of natural gas exploration) will be jeopardized since coal reserve loss will shorten the mine life.

The following table shows how federal coal reserves are diminished as the royalty rate is increased.

Federal Royalty Rate (% of Selling Price)	Mineable Federal Coal (Millions of Tons)
0	11.0
3	10.5
6	9.7
9	8.5
12	7.6
12½	7.5

The previous royalty of 17½ cents/ton is not shown as this rate would not seriously impact the coal reserve base. What is readily apparent is the dramatic loss of federal coal as the royalty rate increases. At 12½%, 3.5 million tons of coal are condemned (reclamation standards dictate restoration of regional drainage which means backfilling the mined out pit). Lost revenue to FMC is substantial, but it should be noted that the United States would also lose royalty revenue on this tonnage.

Assuming that the next lease readjustment of FMC's competitor will bring his royalty rate up to the same level, chances of pass through improve. However, the problem still exists that only 15% of our sales will carry a passed on federal royalty. The remaining 85% of sales will still carry the royalty burden and the result in a financial loss situation at the mine.

V. Proposed Solution

When the law was passed which changed the royalty rates on coal, Congress recognized the high cost of underground mining by providing a lower royalty rate. It also recognized that certain operations may be more expensive than others and hence provided a mechanism for royalty rate reduction requests. FMC's intention is to ask the Department of Interior to give special consideration to Skull Point. There are two reasons for this request: an unfair competitive disadvantage of our neighbors having a lower rate, and the peculiar nature of our special bituminous mine.

The current mine profit is approximately \$1.20/ton on a selling price of \$20.60/ton. These economics will yield a return on investment of approximately 12%. Applying a 12% $\frac{1}{2}$ royalty to the selling price (fair market value) would result in a non-recoverable charge of \$2.57/ton. Obviously, as soon as the royalty is imposed, profit would change to loss and the return on investment would be zero. The only remedy would be pass through of the royalty cost to the customer. Since the neighboring operation is identical, only similar costs can be passed on to customers. Unfortunately, royalty costs are very dissimilar (\$.17 $\frac{1}{2}$ /ton versus \$2.57/ton).

Conclusion

In summary, allowing FMC a 17 $\frac{1}{2}$ cents per ton royalty until such time as the neighboring mine's royalty is readjusted will enable FMC to achieve maximum eco-

nomie recovery. Furthermore, as can be seen by the Table on page 9, a reasonable royalty for the entire operation must be granted to prevent loss of recoverable reserves.

FMC requests that Interior carefully review the circumstances of the Skull Point Mine and develop a royalty which recognizes the unique mine design and maximizes recovery of federal coal. FMC is willing to meet at your convenience to further discuss this issue and clarify the points made in this proposal. Please let us know of a potential meeting date.

/s/ John Corra
JOHN CORRA
Resident Manager
Skull Point Mine
FMC Corporation

cc: Ken Lee
Harold Stinchcomb
Brian Kennedy
Jim Burridge
Carol Smith

(2)
No. 87-560

Supreme Court, U.S.
FILED

DEC 30 1987

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

FMC WYOMING CORPORATION, PETITIONER

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT**

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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9 pp

QUESTION PRESENTED

Whether Section 6 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. 207, which provides that the Secretary of the Interior shall not include in a coal lease a royalty of less than $12\frac{1}{2}\%$ of the value of the coal, applies to leases entered into prior to FCLAA's enactment upon post-FCLAA readjustment of their terms.

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FMC WYOMING CORPORATION, PETITIONER

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*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 816 F.2d 496. The opinion of the district court (Pet. App. 12a-20a) is reported at 587 F. Supp. 1545. The opinion of the Interior Board of Land Appeals (Pet. App. 21a-31a) is reported at 74 I.B.L.A. 389.

JURISDICTION

The court of appeals entered its judgment on April 9, 1987. A petition for rehearing was denied on July 8, 1987. The petition for a writ of certiorari was filed on October 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 1, 1963, the Department of the Interior issued two coal leases to FMC Wyoming Corporation (FMC) pursuant to the Mineral Lands Leasing Act of 1920

(MLLA), ch. 85, 41 Stat. 437. Section 7 of that Act then provided that leases were for "indeterminate periods," but that "at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods" (30 U.S.C. (1958 ed.) 207). The terms of the two FMC leases reflect this statutory provision. Under each lease, the United States expressly reserved "[t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period" (Pet. App. 62a-63a, 76a-77a).¹ The initial royalty rate established by the two leases in 1963 was 17½ cents per ton of coal (*id.* at 58a, 72a).

In 1976, Congress enacted the Federal Coal Leasing Amendments Act of 1976 (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083, Section 6 of which amended Section 7 of the MLLA in two relevant respects (90 Stat. 1087). First, rather than being conferred for a nominally "indeterminate period" subject to readjustment and other conditions, "[a] coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease," but "[a]ny lease which is not producing commercial quantities at the end of ten years shall be terminated" (30 U.S.C. 207(a)). FCLAA also raised the floor on royalty rates. The Secretary must now "require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum

¹ The appendix to the petition for a writ of certiorari inaccurately omits "unless" prior to the phrase "otherwise provided by law" (see Pet. App. 63a, 77a). The petition accurately reproduces the language of the two leases (see Pet. 3).

of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations" (*ibid.*). Under FCLAA (*ibid.*), "rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended."

2. On August 23, 1982, six months before the two FMC coal lease terms were subject to their first 20-year readjustment, the Bureau of Land Management (BLM) notified FMC that it intended to readjust the 1963 leases (Pet. App. 32a). On December 22, 1982, BLM notified FMC that, as readjusted, the two leases would incorporate the requirements of the FCLAA, including the 20-year term and the minimum royalty rate of 12½% of the value of the coal (*id.* at 32a-34a). FMC filed objections to the new lease terms (*id.* at 120a-125a). BLM dismissed the objections (*id.* at 32a-36a) and the Interior Board of Land Appeals affirmed (*id.* at 21a-31a).

3. On August 29, 1983, FMC brought this action in the United States District Court for the District of Wyoming, which reversed the Secretary's determination (Pet. App. 12a-20a). The district court held (*id.* at 17a, 20a) that it was arbitrary and capricious to "flatly and mandatorily impose[] [the new rate] on pre-existing leases at the time of readjustment" without "a complete evaluation of all the factors involved in an individual case." The court accordingly remanded the matter to BLM for "careful consideration of the facts and circumstances involved in [readjustment], and especially those specific to [FMC's] leases" (*id.* at 20a).

4. The court of appeals reversed (Pet. App. 1a-11a). The court concluded (*id.* at 9a-11a) that Section 6 of FCLAA applies where, as in this case, leases entered into prior to FCLAA are subject to readjustment subsequent to the effectiveness of FCLAA. The court stressed (Pet. App.

11a) that both the language of the statute in effect at the time the leases were entered into and the terms of the two leases support the application of the requirements of FCLAA upon readjustment of the leases.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Contrary to petitioner's assertion (Pet. 8-11), the court of appeals' decision does not conflict with the principle that, in the absence of clear expression of congressional intent to do so, " 'retrospective operation will not be given to a statute which interferes with antecedent rights.' " Pet. 9 (quoting *Union Pacific R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)); *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982). Application of Section 6 of FCLAA to FMC's leases neither interferes with "antecedent rights" nor constitutes a "retrospective operation" of law.

Both of FMC's coal leases expressly provided, as did the MLLA in 1963 when those leases were entered into, that their terms and conditions were subject to "readjustment" at the expiration of a 20-year period. Both further provided that the Secretary could exercise his judgment in "reasonably" adjusting the terms and conditions "unless otherwise provided by law at the time of * * * expiration" (Pet. App. 63a, 77a; see note 1, *supra*). At the time of the expiration of the 20-year period, which was seven years after FCLAA was enacted, Section 6 of that Act provided that the Secretary must establish a royalty rate of not less than 12½% of the value of the coal mined. Thus, the Secretary's determination that the royalty must henceforth be paid at the 12½% rate is simply a readjustment of the two leases as expressly contemplated by their terms. It is

fully consistent with FMC's rights under the leases and is not retroactive in nature.²

For this reason, there is no merit to petitioner's claim (Pet. 11-13) that Section 6 of FCLAA must be construed not to apply to petitioner's leases in order to avoid a Fifth Amendment taking. Application of Section 6 to petitioner's leases, at the time those leases are by their terms subject to readjustment, is not an unconstitutional taking or, indeed, a taking at all. It is well settled that Congress may, as it did in petitioner's leases, reserve to itself the authority to amend the law and thus the terms by which continuation of the leases will be offered without offending the Fifth Amendment Takings Clause. See *Bowen v. Public Agencies Opposed to Social Security Entrapment*, No. 85-521 (June 19, 1986), slip op. 11-14; see also *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005-1010 (1984).³

² Petitioner ignores the substantial restrictions included in the 1963 leases in claiming (Pet. 8) that "[t]he contract and property rights created by the indeterminate term coal leases issued under [the MLLA] are * * * vastly more substantial than those created by section 6 of the FCLAA." Although the prior leases were issued for an indeterminate period, they were subject to periodic readjustment of their terms and to cancellation if the lessees did not undertake diligent development or failed to continue to operate the mine (see 30 U.S.C. (1958 ed.) 207).

³ Petitioner's suggestion (Pet. 10 & n.5) that the increased royalty rate may force some pre-FCLAA lessees to abandon valuable coal deposits ignores the possibility of relief under Section 39 of the Mineral Lands Leasing Act, 30 U.S.C. 209. Section 39, which was not affected by FCLAA, allows the Secretary to reduce the royalty rate to promote development or to allow a lessee to operate a mine successfully. Thus, even if there otherwise were a basis for petitioner's taking claim, "[t]he potential for such administrative solutions * * * [would indicate] that the taking issue * * * simply is not ripe for judicial resolution." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (footnote omitted).

2. Moreover, congressional intent to apply the requirements of Section 6 of FCLAA to pre-FCLAA coal leases upon post-FCLAA readjustment of their terms is clear. Representative Mink, whom petitioner describes (Pet. 14) as the "principal author" of FCLAA, addressed that question during the legislative debates: "The 533 existing Federal leases would be unaffected by the bill except to the extent its provisions are made applicable upon the periodic ten year adjustment of lease terms, or upon the inclusion of an existing lease in a logical mining unit" (see 122 Cong. Rec. 489 (1976); *id.* at 25464 (remarks of Rep. Baucus); see also S. Rep. 95-1169, 95th Cong., 2d Sess. 7 (1978) ("[a]ll leases would of course be subject to the provisions of the 1976 amendments at the expiration of their original lease term[s]."); Pet. App. 10a-11a n.11). Hence, the court of appeals, which is the first court of appeals to address the issue,⁴ correctly upheld the Secretary's construction of Section 6 of FCLAA.

CONCLUSION

The petition for a writ of certiorari should be denied.

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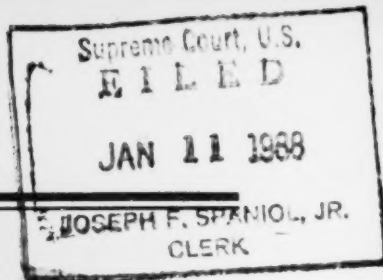
Attorneys

DECEMBER 1987

⁴ Amici (Br. Western Coal Traffic League 9-10; Br. Nat'l Coal Ass'n 13-14; Br. Colowyo Coal Co. 3-4) argue that this Court should grant review in this case to prevent "anticipated" or "possible" conflicts in the circuits. There is, however, no reason to assume that a conflict will develop or for this Court to depart from its usual practice of waiting to see whether an actual conflict develops.



No. 87-560



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Petitioner,

v.

DONALD P. HODEL, Secretary of Interior, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals for
the Tenth Circuit**

**REPLY BRIEF FOR THE PETITIONER
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-560

FMC WYOMING CORPORATION,
Petitioner,

v.

DONALD P. HODEL, Secretary of Interior, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals for
the Tenth Circuit**

**REPLY BRIEF FOR THE PETITIONER
FMC WYOMING CORPORATION**

ARGUMENT

**I. Respondents' Arguments Fail to Address the Central
Issue Raised by FMC's Petition: Section 6 Does Not
Apply to Pre-FCLAA Leases.**

Because section 6 of the Federal Coal Leasing Amendments Act of 1975 ("FCLAA"), 30 U.S.C. § 207 (1982) describes a completely different kind of coal lease and

does not even mention existing coal leases, FMC has consistently pointed out that it cannot apply to pre-FCLAA leases under all applicable principles of statutory construction. Congressional silence cannot transform FCLAA into a law that radically alters existing leases.

FMC's coal leases were issued under section 7 of the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 207 (1970), which provided among other things that coal leases would be subject to readjustment every twenty years "unless otherwise provided by law at the time of the expiration of such periods." *Id.* Pointing to this language, Respondents argue that the Tenth Circuit's decision was correct because the readjustment was nothing more than application of the new law existing at the expiration of FMC's first twenty-year readjustment period.

This argument completely begs the question. The issue raised by FMC's Petition is whether or not section 6 of the FCLAA does, in fact, "otherwise provide" for pre-FCLAA leases. Stated differently, the question presented is whether or not section 6 of the FCLAA even applies to pre-FCLAA leases. If it does not, then the law does *not* "otherwise provide" and Interior's arbitrary readjustment was unlawful.

Respondents' Brief in Opposition is therefore based on the assumed truth of the very issue raised for consideration by FMC's Petition. The most important issue currently facing the entire western coal industry is whether or not, as a matter of statutory construction, section 6 of the FCLAA applies to pre-FCLAA leases as a matter of law. Interior simply assumes for purposes of its argument to this Court that it does. This is precisely the same logical error made by the Tenth Circuit, and the effect of this error is to destroy the vested rights of hundreds of mineral lessees.

II. The Taking Issues Raised By the Tenth Circuit's Decision are of First Impression and Cannot be Dismissed by Citation to Authority Not on Point.

Relying once again on the "unless otherwise provided by law" language of the Mineral Lands Leasing Act, Interior argues that Congress reserved the power to amend the provisions relating to coal leasing and therefore imposition of the FCLAA on to pre-FCLAA leases cannot constitute a taking under *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986). As FMC pointed out in its Petition, however, it is not at all clear that the "unless otherwise provided by law" language of the Mineral Lands Leasing Act constitutes a reservation of power. Unlike *Bowen*, where Congress reserved the right to repeal the statute altogether, the express congressional intent in passing the Mineral Lands Leasing Act was to provide coal operators with certainty and stable, long term development rights. Since Congress deliberately created property rights with the Mineral Lands Leasing Act, any constitutional limit to the reservation of power doctrine are implicated here.

Since the Tenth Circuit's decision will dramatically affect the basic property rights of over 400 federal coal leases covering over 12 billion tons of coal, the taking issue can not be dismissed by citation to a case involving social security contributions.

III. Interior Has Already Acknowledged that the Legislative History Provides Little Guidance on the Issues Raised by FMC's Petition.

Finally, Respondents argue that it is "clear" Congress intended section 6 of the FCLAA apply to pre-FCLAA leases at readjustment. This categorical assertion is contradicted by the government's earlier position. Interior's construction of the FCLAA was based initially on a Solicitor's Opinion published in 1981 in which the Solicitor's office concluded that the terms of section 6 of the FCLAA

must be applied as a matter of law to pre-FCLAA leases. *Whether Leases Issued Prior to Aug. 4, 1976, Subject to Readjustment After That Date Must Be Readjusted to Conform to the Federal Coal Leasing Amendments of 1976*, Opinion by the Office of Solicitor #M-36939, 88 Interior Dec. 1003 (September 17, 1981). In that Opinion, the Solicitor exhaustively analyzed the legislative history of the FCLAA and concluded that the history "shed little light" on whether or not Congress intended section 6 of the FCLAA to apply to pre-FCLAA leases. *Id.* at 1007. The Solicitor noted that there are a number of conflicting indications of intent in the record. One of the examples he cited specifically discussing the *ambiguity* of the legislative history was the same comment of Representative Mink now relied upon by Respondents in support of their new assertion that congressional intent is "clear" in the legislative history. *Id.* at 1007-1008.

The Solicitor observed that Representative Mink's statement that existing leases would only be affected by FCLAA "to the extent" its provisions were applied upon readjustment could be read to mean FCLAA did *not* apply unless Interior chose to impose FCLAA terms upon readjustment. FMC agrees. If Congress intended FCLAA to apply to existing leases it could have simply said so. It did not. In fact, in 1978 Congress considered an amendment which would have explicitly applied FCLAA to pre-FCLAA leases and it failed. 124 Cong. Rec. 30,372-73 (1978).

CONCLUSION

In response to the important issues raised by FMC's Petition and the Briefs of *amici*, Interior could do nothing but advance deceptively facile arguments which beg the question and which are contradicted by their own prior conclusions. FMC respectfully requests that the Petition for Certiorari be granted.

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IN THE
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DONALD P. HODEL,
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Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

**BRIEF OF AMICI CURIAE
WESTERN COAL TRAFFIC LEAGUE AND
NATIONAL RURAL ELECTRIC COOPERATIVE
ASSOCIATION IN SUPPORT OF THE PETITION
FOR CERTIORARI**

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For The Tenth Circuit

BRIEF AMICI CURIAE

This brief is filed on behalf of the Western Coal Traffic League ("WCTL") and the National Rural Electric Cooperative Association ("NRECA") (jointly referred to as "Amici"). Pursuant to this Court's Rule 36, Amici have received the written consent of counsel for all parties to file this brief. Copies of the consents have been filed with the Clerk. Amici submit this brief in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by FMC Wyoming Corporation on October 6, 1987.

IDENTITY AND INTEREST

WCTL is an association of utility organizations who purchase and use over 50 million tons of bituminous coal annually. Nearly 100 percent of the coal consumed by WCTL members comes from mines located west of the Mississippi River. NRECA is a national service organization representing more than 1,000 rural electric systems in 46 states. These systems, mostly all cooperative, serve more than 25 million consumers in 2,600 of the 3,100 counties in the United States. Members of NRECA provide electricity to over 70 percent of the land area of this nation.

Amici appear on behalf of the nation's electric consumers. We conservatively estimate that implementation of the Department of the Interior ("DOI") royalty readjustment procedures upheld by the United States Court of Appeals for the Tenth Circuit in the proceeding below will produce an increase in consumer electric bills totalling over \$2 billion in the next decade. By mandating these increases, the federal government has joined the ranks of other interest groups who have exploited their particular monopolies over utility purchasers of western coal.

Most federal coal is located in six western states (Colorado, Montana, New Mexico, North Dakota, Utah, and Wyoming). For many years, these coal lands lay largely undeveloped. However, at the urgent behest of the federal government during the Congressionally-declared "energy crisis" of the 1970's,¹ western utilities provided

¹ During the 1970's, Congress enacted several laws directing utilities to utilize domestic coal as a boiler fuel. *See, e.g., Emergency Petroleum Allocation Act of 1973*, Pub. L. No. 93-511, 88 Stat. 1608 (1974); *Federal Non-nuclear Energy Research and Development Act of 1974*, Pub. L. No. 93-577, 88 Stat. 1878 (1974); *Energy Reorgan-*

the capital guarantees and long-term purchase commitments needed to develop these vast national resources. In 1973, federal coal production stood at 14 million tons. DOI, *Federal Coal Management Report (Fiscal Year 1986)* 65 (1987). Today, federal production equals 163.9 million tons (*id.*), and is projected to grow significantly by the year 2000. Most of this coal is sold to electric utilities via long-term coal supply contracts. These contracts—which were absolutely essential to the development of federal coal leases²—tie utility coal purchases to specific coal mines and require that utilities pay all production-based taxes and royalties (and increases in these expenses) on a direct pass-through basis.

After becoming “captive” to specific producing leases, states, and mines as a result of long-term contract commitments made at the express request of the federal government, utilities have seen various groups engage in special interest profiteering at their expense. First, five of the six federal coal producing states enacted massive increases in their state coal severance taxes of the type considered by this Court in *Commonwealth Edison Co v.*

ization Act of 1974, Pub. L. No. 94-438, 88 Stat. 1233 (1974); *Energy Supply and Environmental Coordination Act of 1974*, Pub L. No. 93-319, 88 Stat. 246 (1974); *Energy Policy and Conservation Act*, Pub. L. No. 94-163, 89 Stat. 871 (1975); *Energy Conservation and Production Act*, Pub. L. No. 94-385, 90 Stat. 1125 (1976); and *Powerplant and Industrial Fuel Use Act*, Pub. L. No. 95-620, 92 Stat. 3289 (1978).

² Coal companies would not develop coal fields without assurances that utilities would commit for long-term purchases. Similarly, lenders would not provide capital to coal companies without assurances that the companies had guaranteed long-term customer purchase commitments.

State of Montana, 453 U.S. 609 (1981).³ Next, the western coal-hauling railroads endeavored to exploit their power over the massive new western coal production by imposing monopolistic rates on coal of the type described in the Court's decision in *Burlington Northern Inc. v. United States*, 459 U.S. 131 (1983).⁴ Now, the same federal government that urged utilities to become captive to federal coal is endeavoring to exploit its monopoly by unilaterally imposing tremendous royalty increases on federal coal—increases the government knows will be borne by electric utility ratepayers.

³ As observed by one commentator:

[S]ince 1971 the coal-producing states have increased their severance taxes to *unprecedented levels*, bringing about a tremendous transfer of money from the coal-consuming states to the coal producing states.

Note, 8 Colum. J. Envir. L. 185, 186 (1982) (emphasis added). In 1985, for example, the State of Montana collected \$91 million in coal severance taxes, and the State of Wyoming collected \$125 million. U.S. Dep't of Commerce, *State Government Tax Collections in 1985*, Table 9 (1985). Over the past ten years (1976 to 1985), the States of Wyoming and Montana have collected a combined total of over \$1.2 billion in severance taxes. *Id.*

⁴ The well-known impact of western railroads monopoly pricing of western coal transportation is chronicled in Congressional reports as well as in the law reviews. See, e.g., *Railroad Coal Rates and Public Participation: Oversight of ICC Decisionmaking Report, Together with Separate Views of the House Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce*, Comm. Print IFC-40, 96th Cong., 2d Sess. (1980); *Singing the Coal Train Blues: The ICC, Railroad Coal Hauling Rates and National Energy Policy*, 11 St. Mary's L.J. 734 (1980); Clark, *Coal Freight Rates in the United States: An Inevitable Conflict Between Economical Energy and Railroad Monopoly Pricing*, 44 I.C.C. Prac. J. 292 (1977); Freeman, *The Ties That Bind: Railroads, Coal, Utilities, the ICC and the Public Interest*, 14 Transp. L.J. 1 (1985).

The ultimate payors of the federal coal royalty are the nation's electric consumers. From an economic perspective they are the real parties in interest in these review proceedings. Accordingly, Amici have a direct and substantial interest in the issues raised by Petitioner, FMC Wyoming Corp.

REASONS FOR GRANTING THE WRIT

Amici support the reasons for granting certiorari set forth by Petitioner. Two additional grounds, discussed below, provide further support for granting the petition: (1) the Tenth Circuit's incorrect decision mistakenly paves the way for massive increases in consumer electric bills, and (2) Supreme Court review at this time could resolve the unprecedented number of similar litigations now pending at DOI and in the courts.

I. THE TENTH CIRCUIT'S DECISION MISTAKENLY SANCTIONS MULTI-BILLION DOLLAR CONSUMER PRICE INCREASES

The federal coal leases at issue here provided that Petitioner pay 17.5 cents per ton for the federal coal royalties for a twenty-year period. Petitioner's App. F at 58a. The Government reserved the right, however, to readjust the royalty rate "reasonably" on the twenty-year anniversary of the lease unless "otherwise provided by law at the time of the expiration of any such [twenty-year] period." *Id.* at 63a. The royalty rates and readjustment provisions in Petitioner's leases are identical to those found in the majority of leases that predate the Federal Coal Leasing Amendments Act ("FCLAA"), 30 U.S.C. § 201 *et seq.* (1982).⁵

⁵ The "customary" average royalty rate on pre-FCLAA leases is 17-1/2 cents per ton. DOI, *Mineral Revenues: The 1985 Report on Receipts from Federal and Indian Lands* 87 (1986). The federal coal lease at issue is a standard "form" lease routinely utilized by DOI prior to FCLAA.

In the proceedings below DOI concluded that it was required by FCLAA to raise the 17.5 cent royalty rate to 12.5 percent of the value of the coal—the statutory minimum rate specified by FCLAA to apply to all post-FCLAA surface leases. DOI is routinely taking the same actions in all pre-FCLAA lease readjustment proceedings. DOI's automatic application of the FCLAA 12.5 percent royalty rate has increased individual utility customers royalty payments by up to 1500 percent. Overall, Amici estimate DOI's application of FCLAA royalty rates actions will produce royalty-induced price increases approximating at least \$250 million annually (when all pre-FCLAA leases have been readjusted) and price increases totalling over \$2 billion in the next decade.⁶

The Tenth Circuit conceded that DOI's readjustment policies are not producing "reasonable" readjusted rates as required by the express terms of the pre-FCLAA lease. Indeed, the Court acknowledged the increase before it was a "drastic" one. Petitioner's App. A at 10a. However, the Court concluded that the "otherwise pro-

⁶ DOI reports that 163.9 million tons of federal coal were mined in federal fiscal year 1986 with a total sales price value of \$2,321 million. *Federal Coal Management Report, supra*, at 65. Had the pre-FCLAA average royalty rate applied (17.5 cents per ton), federal royalty revenues would have equalled approximately \$29 million (163.9 million tons x \$.175). If the FCLAA minimums applied to this tonnage (assumed composite between surface and underground mines of 12.2%), the total collected would approximate \$283 million (\$2,321 million x 12.2%). The difference (\$283 million-\$29 million) approximates \$250 million per year. DOI reported fiscal year 1986 actual royalty receipts of \$101.1 million, which reflects the fact that many pre-FCLAA leases have not yet been readjusted. See General Accounting Office, *Mineral Resources: Coal Lease Readjustment Problems Remedied But Not All Revenue Is Collected* 17 (GAO/RCED-87-164, August 1987) ("GAO Royalty Report").

vided by law" provision in the lease required DOI to impose an unreasonable royalty rate because this result was mandated by Congress in FCLAA. This reading of FCLAA is manifestly incorrect.⁷ The text of FCLAA does not state or imply in any way that Congress intended to impose unreasonable, "drastic" royalty rate increases on electric utility customers. Indeed, a review of the legislative history of FCLAA shows that Congress was particularly concerned that pre-FCLAA royalty levels produce only fair and reasonable royalty levels.

FCLAA was one of many pieces of legislation (*see* pp. 2-3, *supra*) enacted in response to the energy crisis. Its twin goals were to generate federal coal production "to meet the nation's energy needs,"⁸ and at the same time to establish lease rates that produced a "fair return to the public."⁹ To meet these goals, Congress established a minimum surface royalty rate of 12.5 percent of the value of coal "on all *new leases* except for underground mines." H.R. Rep. No. 94-681 at 18, *reprinted in 1976 U.S. Code Cong. & Admin. News* 1954 (emphasis added). Congress did not specify that the new lease rates be automatically applied to pre-FCLAA leases persumably because it understood that such application would produce unfair and unreasonable increases in federal coal royalty collections. Indeed, FCLAA proponents vehemently main-

⁷ The District Court properly concluded that the reasonableness requirement in pre-FCLAA leases requires DOI to make "a complete evaluation of all factors involved in an individual case." Petitioner's App. B at 17a.

⁸ S. Rep. No. 94-296, *Federal Coal Leasing Amendments Act of 1975*, 94th Cong., 1st Sess. 15 (1975).

⁹ H.R. Rep. No. 94-681, *Federal Coal Leasing Amendments Act of 1975*, 94th Cong., 1st Sess. 17 (1975), *reprinted in 1976 U.S. Code Cong. & Admin. News* 1943, 1953 (emphasis added).

tained that the legislation would not produce tremendous increases in federal coal royalty collections.¹⁰

DOI's elimination of the "reasonableness" requirements from federal coal lease readjustments and its automatic application of the 12.5 percent royalty rate are part of its deliberate plan to "maximize" federal returns from captive coal consumers.¹¹ This policy is nothing new to coal utility purchasers of federal coal, who, as described *supra*, have seen coal producing states (via severance taxes) and coal-carrying railroads (via coal freight rate hikes) endeavor to impose similarly oppressive price increases. Utilities and federal coal lessees always assumed that the government would live up to its lease

¹⁰ For example, Congressman Baucus of Montana maintained that "[t]his leasing reform will not significantly increase the price of coal." 122 *Cong. Rec.* 25463 (Aug. 4, 1976). The House Interior Committee similarly concluded that increases in royalty collections contemplated by Congress "will have virtually no inflationary impact on the U.S. economy. . . ." H.R. Rep. No. 94-681 at 26, *reprinted in* 1976 *U.S. Code Cong. & Admin. News* at 1963. However, significant price increases have occurred. The House Interior Committee reported that between 1920 and 1974, DOI collected \$23.3 million in federal coal royalties. *Id.* at 18-19, *reprinted in* 1975 *U.S. Code Cong. & Admin. News* 1953-54. When all its members' federal leases are readjusted, WCTL estimates its members alone will pay nearly twice as much *annually* as the federal government collected during a 54-year period on all federal production. Increases of this magnitude were certainly not contemplated or intended by Congress to result via the application of FCLAA.

¹¹ In its rulemaking defining the coal "value" to which the FCLAA rate will be applied, DOI candidly admitted that its royalty policies are intended to "assure maximum, long-term revenues to all parties concerned." *Revision of Coal Production Valuation Regulations and Related Topics*, 52 Fed. Reg. 1840, 1841 (1987). DOI currently establishes royalty value in most instances as the coal sales price (including all state, local and federal taxes). 30 C.F.R. § 203.200(g).

commitments by imposing only "reasonable" royalty charges. This has proven to be untrue. Amici submit that the government's exploitation of its monopoly royalty pricing powers via tortured readings of its leases and its underlying statutory authority merits review by this Court.

II. REVIEW OF THE TENTH CIRCUIT'S DECISION IS NEEDED TO RESOLVE IDENTICAL ISSUES RAISED IN AN UNPRECEDENTED NUMBER OF PENDING LITIGATIONS

Petitioner's lease is only one of over 500 pre-FCLAA federal coal leases. The *GAO Royalty Report, supra*, found that DOI was managing 538 pre-FCLAA coal leases; that 329 of these leases were subjected to DOI adjustment procedures as of September 30, 1986; and that 98 of these lease readjustments were the subject of pending litigation (78 on administrative appeals at DOI and 20 on appeal in the courts). *GAO Royalty Report* at 17. The total reported number of appeals is likely to grow as additional pre-FCLAA leases are readjusted. Most of these proceedings involve issues that are identical to those raised here.

The sheer magnitude of the pending readjustment cases as well as the financial impact these cases will have on the nation's electrical consumers support immediate Supreme Court review of the Tenth Circuit's decision. Review at this time will promote uniform construction of FCLAA and the underlying federal coal leases, and, if the decision below is set aside, protect consumers from unlawful royalty rate increases.

Moreover, review by this Court could prevent anticipated conflicts between the circuits in the many royalty readjustment cases that already have been or will be filed

outside the Tenth Circuit.¹² The fact that the District Court in the proceedings below arrived at a different lease/statutory conclusion than the Tenth Circuit clearly indicates that the readjustment issues raised here are likely to be subject to differing judicial results in the numerous district and circuit courts where they are or will be presented.

CONCLUSION

For the reasons set forth above, Amici urge this Court to issue a writ of certiorari.

Respectfully submitted,

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¹²The Amicus Brief filed by the National Coal Association *et al.* reports that cases raising the same issues as the instant case are now pending in the District of Columbia and Ninth Circuits. This is just the initial wave of court litigation; much more can be expected as DOI completes internal appellate actions in existing readjustment proceedings and institutes new readjustment actions in connection with the 200 pre-FCLAA leases that have not been readjusted.



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AMERICAN MINING CONGRESS, EXXON COAL U.S.A.,
INC., AMAX INC., PEABODY COAL COMPANY
AND COLORADO-UTE ELECTRIC ASSOCIATION, INC.
AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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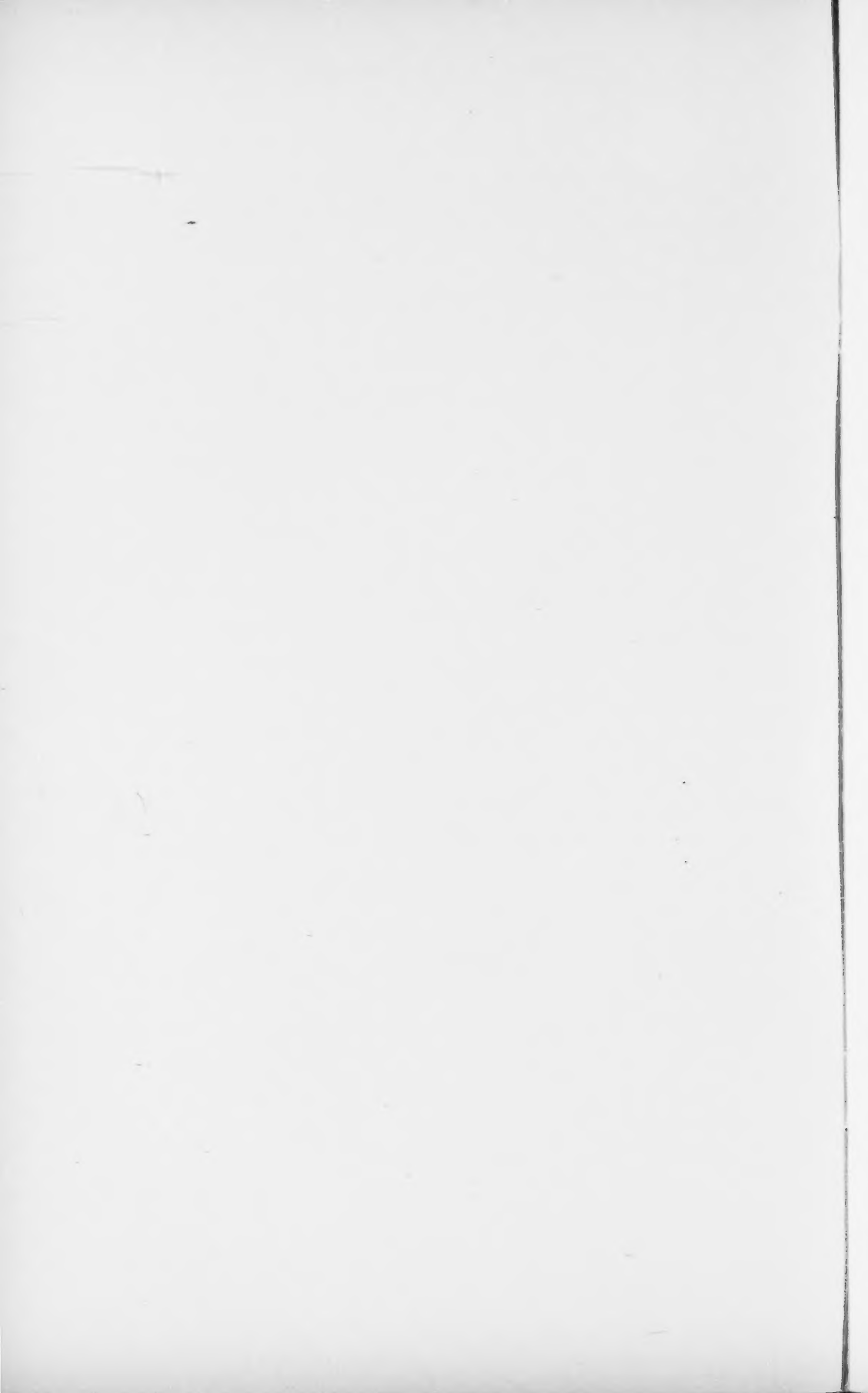


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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-560

FMC WYOMING CORPORATION,
Petitioner,

v.

DONALD P. HODEL, Secretary of the Interior, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit**

**BRIEF OF THE NATIONAL COAL ASSOCIATION,
AMERICAN MINING CONGRESS, EXXON COAL U.S.A.,
INC., AMAX INC., PEABODY COAL COMPANY
AND COLORADO-UTE ELECTRIC ASSOCIATION, INC.
AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER**

The National Coal Association, the American Mining Congress, Exxon Coal U.S.A., Inc. ("Exxon") AMAX Inc. ("AMAX"), Peabody Coal Company ("Peabody") and Colorado-Ute Electric Association, Inc. ("Colorado-Ute") respectfully submit this amicus curiae brief in support of FMC Wyoming Corporation's petition for a writ of certiorari. Pursuant to Supreme Court Rule 36.1, the parties' written consent to file this brief has been obtained and filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The National Coal Association and the American Mining Congress are trade associations whose members include owners of federal coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 ("FCLAA") and who therefore are adversely affected by the decision of the United States Court of Appeals for the Tenth Circuit. Exxon, AMAX and Peabody are three of the six largest holders of federal coal under pre-FCLAA leases; together they hold pre-FCLAA coal leases covering more than three billion tons of coal.¹ Exxon and AMAX have appeals of coal lease readjustments similar to FMC's pending in the U.S. District Court for the District of Wyoming.² Peabody has an appeal pending in the U.S. District Court for the District of Columbia.³ Colorado-Ute is a not-for-profit rural electric utility in Colorado that buys federal coal under long-term coal supply contracts. Under the terms of its contracts, which are typical in the industry, Colorado-Ute—and thus its customers—may be required to bear the increased royalties required by the Tenth Circuit's decision.

STATEMENT OF THE CASE

A brief statement of the background to this case is helpful in understanding the arguments of amicus curiae.

In 1920, Congress passed the Mineral Leasing Act, 30 U.S.C. § 181, *et seq.*, and authorized the Secretary of the

¹ U.S. Congress, Office of Technology Assessment, *Potential Effects of Section 3 of the Federal Coal Leasing Amendments Act of 1976—A Special Report*, 31 OTA-ITE-300 (March 1986).

² *Exxon Coal U.S.A., Inc. v. Hodel*, No. C87-0088 (D. Wyo. filed March 4, 1987); *Meadowlark Farms, Inc. v. Hodel*, No. C87-0024 (D. Wyo. filed Jan. 18, 1987) (Meadowlark Farms is a wholly owned subsidiary of AMAX).

³ *Peabody Coal Company, et al. v. Hodel*, No. 87-1359 (D.D.C. filed May 20, 1987).

Interior to issue leases on the public lands for the development of coal, oil and gas and certain other minerals. The type of lease created was different depending on the mineral. For the development of coal, Congress authorized the Secretary to issue a lease for an "indeterminate period" upon the condition that "at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at time of the expiration of such periods." Section 7 of the Mineral Leasing Act of 1920, 30 U.S.C. § 207 (1970). The leases issued by the Secretary to FMC, Exxon, AMAX, Peabody and others track this statutory language, but also specifically limit the Secretary to a "reasonable" readjustment of the terms and conditions of the lease. *See* FMC's Appendix F, 63A.

Relying on the indeterminate period granted by these federal leases, coal companies such as FMC, Exxon, AMAX and Peabody invested huge sums of money to develop coal mines. Likewise, utility companies such as Colorado-Ute invested huge sums of money to build electric power plants which would depend on the federal coal for fuel. Furthermore, to protect their investments, coal companies and utilities frequently entered into long-term coal supply contracts, typically 35 years in duration. These long-term contracts—which extend longer than the 20-year readjustment interval—generally recognize that lease terms can be changed upon readjustment, and provide for a "pass through" of increased royalties. However, the parties to these long-term contracts expected the readjustment to be "reasonable," as provided in the lease contracts. For more than half a century, the Secretary's readjustments were reasonable.

In 1976, Congress passed the Federal Coal Leasing Amendments Act ("FCLAA"), Pub. L. No. 94-377. This

statute radically altered the kind of lease to be issued in the future; nearly all of the essential terms of the lease were changed. One of the most important of these changes was to increase the minimum royalty from five cents per ton to $12\frac{1}{2}\%$ of the value of the coal. FCLAA says nothing about whether the terms governing new leases must apply upon readjustment of pre-existing leases, and the legislative history "sheds little light" on the question. Solicitor's Opinion M-36939, *Whether Leases Issued Prior to August 4, 1976, Subject to Readjustment After that Date Must be Readjusted to Conform to the Federal Coal Leasing Amendments Act of 1976*, 88 I.D. 1003, 1007 (1981).

After the enactment of FCLAA, the Secretary began taking the position that the terms of FCLAA governing new leases must be applied upon readjustment of pre-FCLAA leases, and that he has no discretion to consider the reasonableness of such terms as applied to any particular lease. Since a large number of the pre-existing leases had been issued in the 1960s, the Secretary's position was not implemented on a wide scale until the last few years, when the 20-year anniversary date of those leases began to expire. Most of the appeals of these lease readjustments are still pending before the Interior Board of Land Appeals, or are in early stages of review in various United States District Courts.

The decision below was the first occasion for a United States Court of Appeals to address whether the terms of FCLAA governing new leases are mandatory upon readjustment of pre-FCLAA leases. The court reversed a decision of the U.S. District Court for the District of Wyoming, and found that FCLAA was a law that "otherwise provided" under Section 7 of the Mineral Leasing Act of 1920. The court consequently held that Congress had vitiated the contractual right to a "reasonable" re-

adjustment contained in pre-FCLAA leases. The court acknowledged there was no indication in FCLAA that Congress intended this result, but held that FCLAA must apply because there was nothing in the Act indicating a contrary intention.

REASONS FOR GRANTING CERTIORARI

This is one of the most important cases ever brought by the Western coal industry. More than 400 leases covering some 12.2 billion tons of coal are involved.⁴ At stake is the nature of the contractual relationship between the United States and the companies it encourages to develop minerals on the federally owned lands; these federal lands comprise one third of the Nation's land and about 50 percent of the West.⁵ Also at stake are hundreds of millions, perhaps billions, of dollars. Supreme Court review is necessary to address the important national issues presented in this case, and to resolve the flood of cases now pending in the Interior Board of Land Appeals and numerous United States District Courts.

I. The Case Presents Questions of National Importance.

Subsumed within FMC's question presented for review are three critical questions that go to the heart of Congress's power to alter the terms of contracts between the United States and private parties:

(1) In enacting the Mineral Leasing Act of 1920, did Congress reserve the unusual power to change, in any way it wanted to, the terms of federal coal leases issued pursuant to that Act?

⁴ See *infra* note 9.

⁵ Public Land Law Review Commission, *One Third of the Nation's Land, A Report to the President and to the Congress* 22-23 (1970).

(2) If Congress reserved such an unusual power, did it exercise that power when it enacted the Federal Coal Leasing Amendments Act of 1976—and thus take away the lessees' contractual right to a "reasonable" readjustment—even though Congress did not say so?

(3) If Congress reserved the power in 1920, and if Congress exercised that power in 1976, is the exercise of that power consistent with the due process clause?

Only if all three questions are answered "yes" can the Tenth Circuit's decision be sustained. Despite the importance of each of these questions, the Tenth Circuit failed to analyze questions (1) and (3), and decided question (2) based only on a footnote in the Secretary's appeal brief.

A. Congress did not intend to reserve an unlimited power to change the terms of coal leases.

In holding that FCLAA was a law that "otherwise provided" under section 7 of the Mineral Leasing Act of 1920, the Tenth Circuit did not analyze the meaning or intent of the "unless otherwise provided by law" clause. It apparently assumed that by this language Congress had reserved the power to impose whatever changes it wanted to upon readjustment of federal coal leases.

Such an assumption is belied by the legislative history of the Mineral Leasing Act of 1920. In enacting that law, Congress wanted to encourage investment of the huge financial resources necessary to develop a coal mine. 51 *Cong. Rec.* 14945 (1914) (statement of Rep. Thomson).⁶ Indeed, Congress created the indeterminate term lease believing it would give coal lessees greater security

⁶ Representative Thomson was a member of the House Public Lands Committee and a key proponent of the mineral leasing legislation. His statement in 1914 is relevant to interpreting the 1920 Act because the coal leasing provision was agreed upon in 1914 and did not change during the succeeding years in which Congress debated the more controversial aspects of the legislation.

for long-term development than other types of mineral leases. *Id.* Giving the Secretary of the Interior the power to readjust the terms and conditions of the leases at the end of 20-year intervals was designed only "to meet materially changed conditions." *Id.*

At issue here is not the Secretary's exercise of discretion to impose reasonable terms to meet materially changed conditions. Indeed, the Secretary claims he has no discretion in this case, and must impose the new lease terms—including the 12½ percent royalty—whether or not they are reasonable. Rather, at issue is whether Congress, by use of the phrase "unless otherwise provided by law" in Section 7 of the 1920 Act, reserved the unlimited power to dictate wholesale changes in the terms of issued leases. Interpreting the "unless otherwise provided by law" clause as reserving to Congress such an unusual power—in effect the power to cancel the lease at each twenty year interval—is contrary to and thwarts the goal of Congress in enacting the Mineral Leasing Act of 1920. As stated by Representative Ferris, who was a sponsor of the bill ultimately enacted in 1920 and Chairman of the House Public Lands Committee:

The proposed bill, if passed, will put it on a decent, fair basis, so that the States will be developed, so that the Government may collect a royalty, *and so men may proceed in an orderly manner under a contract, so that men may know what their rights are and not have them swept away by withdrawal orders, changed rulings, and other changes in policy which the poor prospector can neither fathom nor understand.* The claimants and the Government are both entitled to this much.

58 *Cong. Rec.* 7511 (1919) (statement of Rep. Ferris).

If Congress had truly intended to reserve the unlimited power to completely change the lease terms every twenty years, it is highly unlikely that the Nation's federally owned coal reserves would have been developed. As Con-

gress understood in 1920, a coal company cannot invest the huge financial resources necessary to develop a coal mine with the threat that Congress could make fundamental and unreasonable changes in the lease every 20 years, and say "take it or leave it." There is no indication in the language of the Act or its legislative history that Congress intended such a result.⁷

To the contrary, where Congress intended to reserve in the Government the power to change or even terminate the contract every twenty years, it did so by creating an entirely different kind of lease: a lease for twenty years with a preferential right in the lessee to renew. See 30 U.S.C. § 262 (1982) (sodium leases). The Solicitor of the Interior has recognized that Congress chose the "indeterminate term" for coal leases rather than the twenty-year term with a preferential right to renew in order to give coal lessees the greater long term security needed to develop coal. Solicitor's Opinion M-36943, *Sodium Lease Renewals*, 89 I.D. 173, 174-76 (1982). With no analysis or explanation, the Tenth Circuit's decision ignores Congress's distinction between indeterminate term leases and renewal leases.

B. Congressional silence cannot trigger the exercise of such an unusual power to change a contract between the United States and private parties.

Even assuming Congress reserved the unusual power to completely and radically change the terms of contracts between the United States and private parties, there is no support for the Tenth Circuit's decision that Congress exercised that power when it enacted FCLAA in 1976. The Tenth Circuit reached that conclusion because "we find nothing in our reading of FCLAA (1976), or in

⁷ None of the cases in which this Court has found a broad reserved power involve the language at issue here. See, e.g., *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 106 S.Ct. 2390 (1986), where Congress expressly reserved "the right to alter, amend, or repeal any provision of" the act in question.

its legislative history, to indicate that FCLAA (1976) was *not* to be applied to pre-FCLAA coal leases on their post-FCLAA anniversary date.” *FMC Wyoming Corp. v. Hodel*, 816 F.2d 496, 501 (10th Cir. 1987) (emphasis added). The court admitted that this interpretation results in a “drastic increase in royalty rate,” but asserted that “such is a matter for Congress.” *Id.*

It is ironic that the Tenth Circuit would consider such a drastic increase in royalties on pre-existing leases a “matter for Congress,” but then sanction such an increase with no evidence of Congressional intent. In order to find that Congress has exercised such an unusual provision to alter contract rights, the court should have required evidence of specific Congressional intent to do so. Silence cannot be sufficient to trigger such a provision drastically altering contract rights between the United States and private parties. *See Perry v. United States*, 294 U.S. 330 (1934) (potential impairments of contracts between the United States and private parties should be subject to heightened scrutiny).⁸

C. The exercise of any reserved powers in this case must be consistent with the due process clause.

Although the limits of the reserved powers doctrine have never clearly been enunciated by this Court, in the *Sinking Fund Cases*, 99 U.S. 700, 718 (1879), the Court suggested that the exercise of a reserved power is limited by the due process clause, and thus by some notion of reasonableness. *See also Shields v. Ohio*, 95 U.S. 319, 324 (1877) (“The alterations must be reasonable . . .”). Therefore, if Congress reserved the power in 1920 to completely change the terms of coal leases upon readjust-

⁸ The Tenth Circuit cites legislative history in 1978 to support its decision. 816 F.2d at 501, n. 11. That legislative history is not persuasive. In addition to the fact it was two years after FCLAA, Congress rejected language in the 1978 bill that would have applied FCLAA to pre-FCLAA leases upon readjustment.

ment, and if Congress exercised that power in 1976, the next question is whether the exercise of that power is reasonable.

The application of FCLAA indiscriminately to all pre-FCLAA leases is not reasonable. In 1984, a Commission appointed by Congress to study the federal coal leasing program established by FCLAA concluded that Congress "may have set the 12.5 percent minimum royalty without extensive economic analysis" and apparently just carried over the royalty rate from oil and gas leases. Report of the Linowes Commission, *Fair Market Value Policy for Federal Coal Leasing*, 314 (Feb. 1984). Moreover, the Commission found that "there are major differences in the economics of coal mining among coal regions in the West" and that a royalty rate reasonable for one area might not be reasonable for another. *Id.* at 316.

The Linowes Commission Report deals with new leases issued pursuant to FCLAA, not the readjustment of pre-FCLAA leases. However, if a 12½ percent minimum royalty can be considered unreasonable for new leases containing that rate from their inception, such a royalty is patently unreasonable where lessees have spent millions of dollars developing coal mines in reliance on the terms of pre-FCLAA leases imposing a much lower royalty subject to a "reasonable" readjustment.

In responding to FMC's petition for rehearing below, the Secretary cited *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 106 S.Ct. 2390 (1986), where the Court stated that commercial contracts entered into by the United States remain subject to the "sovereign power" unless surrendered in unmistakable terms. *Id.* at 2397. The Court implied that such a reserved power had few, if any, limitations. *Id.* In addition to the fact *Bowen* involved different statutory language, it also concerned the sovereign power "to implement a comprehensive social welfare program" *Id.* Similarly,

in *Bowen* the Court relied upon *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which involved the sovereign power to impose a tax. In the present case, by contrast, the United States is not exercising a uniquely sovereign power such as the power to protect social welfare or to impose a tax. Instead, it is exercising its power as landowner to develop the terms of mineral leases. Therefore, *Bowen* does not apply.

However, given the Secretary's position that *Bowen* applies to legislation that he claims changes the terms of mineral lease contracts, the Court should grant certiorari to provide guidance on whether the Federal Government has the power to change the terms of mineral leases in any way it chooses. If the Government has such a power, it will have a dramatic impact on development of mineral resources on the public lands.

II. The Ramifications of the Tenth Circuit's Decision Are Enormous.

The Tenth Circuit's decision also warrants review because of its enormous ramifications. There are currently 429 pre-FCLAA coal leases in effect covering some 12.2 billion tons of coal.⁹ If the Tenth Circuit's decision stands, and the royalties are uniformly increased from an average of 17½ cents per ton to 12½ percent, royalty costs will not merely double or triple, but will increase by some *ten* to *twenty* times, depending on the coal region involved. If only two billion tons of coal under pre-FCLAA leases are mined by the year 2000—a conservative assumption because 163.9 million tons of federal coal were mined in fiscal year 1986¹⁰—this could increase the

⁹ Telephone interview with the Department of the Interior's Division of Solid Minerals (Oct. 30, 1987).

¹⁰ U.S. Department of the Interior, *Federal Coal Management Report, Fiscal Year 1986* at 1 (June 1987).

coal industry's royalty costs by some two *billion* dollars during that period.¹¹ To further illustrate the economic effects of the Tenth Circuit's decision, the increased royalties from readjustment of two leases at AMAX's Belle Ayr and Eagle Butte mines in Wyoming are in excess of 35 million dollars for the past two years.

This is not just an increased cost to be borne by the coal industry. Many coal companies can pass these increased royalty costs on to their customers—generally electric utilities—under long-term coal supply agreements. Amicus Colorado-Ute is in precisely this situation. These utilities will be forced to pass on this cost to their customers. The end result is that much of the huge increase in royalties will be paid by the public in states where utilities burn federal coal. These states are not just in the West where the coal is produced, but include, *e.g.*, Texas, Minnesota, Wisconsin and Illinois.¹²

In addition to the economic impact, the Tenth Circuit's decision has extensive ramifications in terms of the lands affected. Pre-FCLAA coal leases cover more than 700,000 acres of public lands in fourteen different States.¹³ Furthermore, the "unless otherwise provided by law" language is not unique to coal leases. Congress also used that phrase in the leasing provisions of the Mineral Leasing Act of 1920 for phosphate (30 U.S.C. § 212) and

¹¹ In 1985, the average coal price in the West was about \$14 per ton. U.S. DOE/EIA, *Annual Coal Production for the Year 1985*. Information for 1986 is not yet available. To be conservative, we have calculated these additional royalty costs by using an average price of \$10 per ton over the next 13 years.

¹² Not all federal coal is sold to utilities under long-term contracts that permit a pass through of increased royalties. For example, FMC's coal is not sold under such a contract. Where coal is not sold under long-term contracts, the lessee must increase the price of coal to recover the increased royalty cost. If the market will not permit increasing the price, the lessee will bear the increased costs.

¹³ Office of Technology Assessment, *supra* note 1, at Appendix D.

sodium leases (30 U.S.C. § 262), and in a 1927 statute dealing with potash leases (30 U.S.C. § 283). Consequently, this case is similar to *Andrus v. Utah*, 446 U.S. 500, 506 (1980), where the Court granted certiorari to resolve "a significant issue regarding the disposition of vast amounts of public lands."

III. Supreme Court Review is Necessary to Resolve the Flood of Pending Cases in the Board of Land Appeals and the Lower Courts.

Because of the timing of lease readjustments to correspond with leases issued in the 1960's, *FMC* represents just the tip of the iceberg of lease readjustment litigation.

According to a 1987 General Accounting Office Report, as of September 30, 1986, 167 pre-FCLAA leases had been readjusted; 98 lease readjustments were in various stages of appeal: 78 were pending in the Interior Board of Land Appeals, and 20 were pending in various courts.¹⁴ During the past year, the Board of Land Appeals has decided many of its pending cases (appeals of which are being filed in district court), but about 33 cases remain.¹⁵ Since between 200 and 300 pre-FCLAA leases have not yet been readjusted, the back-log of cases in the Department will only get worse.

Although we have not compiled a complete listing of cases pending in the U.S. district courts, there are cases now pending in district courts within three different circuits: the Tenth, Ninth and D.C. Circuits. At least three cases are pending in the U.S. District Court for the District of Wyoming,¹⁶ and at least two cases are pending

¹⁴ U.S. General Accounting Office, *Coal Lease Readjustment and Revenue Collection* 17 (Aug. 1987).

¹⁵ Telephone interview with counsel for the Board of Land Appeals (Oct. 29, 1987).

¹⁶ *Exxon Coal U.S.A., Meadowlark Farms*, *supra* note 2, and *Ark Land Company v. Hodel*, No. C85-313K (D. Wyo. October 1, 1987).

in the U.S. District Court for the District of Colorado.¹⁷ Two cases are or will soon be pending in the U.S. District Court for the District of Montana.¹⁸ Three cases are pending in the U.S. District Court for the District of Columbia, and we understand other companies are preparing appeals to be filed there.¹⁹ Other U.S. district courts and circuits could eventually become involved because pre-FCLAA coal leases are also in effect in the States of Alaska, Alabama, California, Kentucky, North Dakota, New Mexico, Oklahoma, Oregon, Pennsylvania, Utah and Washington.²⁰ Accordingly, even if the Tenth Circuit's decision in *FMC* will govern other cases filed in district courts within that Circuit, it will not end the lease readjustment litigation.

In view of the importance of the issues, the enormous economic impact, and the public lands affected in fourteen States, the Court should grant certiorari and resolve these issues now rather than waiting for a possible conflict among the circuits. Supreme Court review of these important issues now would avoid several years more of litigation in the Tenth and other circuits. Furthermore, if this Court waits for a conflict among the circuits, lessees who unsuccessfully pursued appeals in the Tenth Circuit may not be able to benefit from Supreme Court review of a decision from another circuit. Fair and uni-

¹⁷ *Powderhorn Properties v. Hodel*, No. 87-K-350 (D. Colo. filed March 10, 1987); *Trapper Mining Inc. v. Hodel*, No. 87-Z-979 (D. Colo. filed July 2, 1987).

¹⁸ *Consolidated Coal Co. & Chevron Coal Co. v. Hodel*, No. CV85-361 BLG-JFB (D. Mont. filed Dec. 2, 1985); Western Energy Company is in the process of filing an appeal in Montana from *Western Energy Co.*, IBLA 86-1244 (1987).

¹⁹ *Peabody Coal Co., et al., Hodel*, No. 87-1359 (D.D.C. filed May 20, 1987); *Colowyo Coal Co. v. Hodel*, No. 87-2325 (D.D.C. filed August 21, 1987); *Western Fuels-Utah, Inc. v. Hodel*, No. 87-2669 (D.D.C. filed Sept. 29, 1987).

²⁰ Office of Technology Assessment, *supra* note 1, at Appendix D.

form administration of public land mineral leases requires that certiorari be granted in this case.

CONCLUSION

For these reasons, amicus curiae National Coal Association, *et al.*, urge this Court to grant certiorari.

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IN THE
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OCTOBER TERM, 1987

FMC WYOMING CORPORATION,
v. *Petitioner,*

DONALD P. HODEL, Secretary of the Interior, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

**AMICUS CURIAE BRIEF OF
COLOWYO COAL COMPANY
IN SUPPORT OF THE PETITIONER**

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Section 5, 30 U.S.C. § 202(a)(5)	8
Section 13, 30 U.S.C. § 203	8
Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1970)	
Section 7, 30 U.S.C. § 207	4, 6
LEGISLATIVE MATERIALS:	
H. Rep. 17, 62nd Cong., 2d Sess. 3, 4 (1916)	6
H. Rep. 668, 61st Cong., 2d Sess. 3, 4 (1914)	6
H. Rep. 681, 94th Cong., 2d Sess. 10, 15, 26 (1976)	3, 8
S. Rep. 352, 61st Cong., 2d Sess. 3, 10 (1914)	5
51 Cong. Rec. 14945 (1914)	5
122 Cong. Rec. 489 (1976)	8
124 Cong. Rec. 30,372-73 (1978)	8
OTHER MATERIALS:	
Commission on Fair Market Value Policy For Federal Coal Leasing	
Final Report, pp. 313-319 (1984)	2
Decisions of the United States Department of the Interior Solicitor	
M-36939, 88 Interior Dec. 1003 (1981)	5
Sodium Lease Renewals, GFS (MIN) S0-4 (1982)	5
United States Congress Office of Technology Assessment	
Special Report, "Potential Effects of Section 3 of the Federal Coal Leasing Amendments Act of 1976" (March 1986)	3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-560

FMC WYOMING CORPORATION,

v.

Petitioner,

DONALD P. HODEL, Secretary of the Interior, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Colowyo Coal Company ("Colowyo") respectfully submits this amicus curiae brief urging the Court to grant certiorari in this proceeding.¹

INTEREST OF THE AMICUS CURIAE

Colowyo is one of many federal coal lessees who are now, or will be, severely prejudiced in the ongoing operation of their leases if the issues raised by the Tenth Circuit's decision are not promptly resolved. First, its vested rights in a federal coal lease

¹ Colowyo has filed separately with the Clerk consents of the parties to participate in this proceeding in an amicus curiae capacity.

issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 ("FCLAA"), Pub. L. 94-377, 90 Stat. 1087, are substantially curtailed if the Tenth Circuit's decision properly states the law. Colowyo owns a lease issued in 1924, soon after Congress enacted the Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1970), and over a half-century before FCLAA's enactment. The terms of that lease may be readjusted only as necessary, in Congress' words, to "meet materially changed conditions" arising subsequent to the last lease readjustment. Colowyo developed that lease in reliance on those rights at a capital cost exceeding \$100 million. And the Tenth Circuit's decision, if adopted generally, will result in imposition of royalties that are wholly inconsistent with those rights and that an independent commission has concluded have no basis in fact and are unconscionably high in all but extraordinary circumstances.² Second, Colowyo believes that the Tenth Circuit's decision, if adopted generally, will substantially alter the future course of coal development in the United States. Many undeveloped coal deposits will never be mined. Coal from existing mines that lessees planned to mine will not be produced. And the long-standing national policy to ensure energy independence at least partially through development of plentiful domestic coal supplies will be thwarted.

REASONS FOR GRANTING CERTIORARI

Colowyo submits that the Court should grant certiorari because the Tenth Circuit has decided (i) "an important question of federal law which has not, but should be, settled by this Court" and (ii) "a federal question in a way in conflict with applicable

² The Commission On Fair Market Value Policy For Federal Coal Leasing, established by Pub. L. 98-63, 97 Stat. 63 (1983), found that there is no basis for a uniform 12.5 percent royalty and concluded that such a royalty "might be reasonable for some highly efficient mining operations" where surface mining is extremely efficient and coal mining costs are very low. Final Report Of The Commission On Fair Market Value Policy For Federal Coal Leasing, pp. 313-319 (1984).

decisions of this Court." Supreme Court Rule 17.1(c). In particular:

I. DEFINITIVE RESOLUTION OF ISSUES RAISED BY THE TENTH CIRCUIT'S DECISION IS NEEDED NOW TO SETTLE EVER INCREASING NUMBERS OF DISPUTES ARISING BEFORE THE COURTS AND THE DEPARTMENT.

This case requires construction of federal statutes of general applicability and overwhelming importance to all who seek to develop federal coal deposits owned by the United States, to all who purchase that coal to generate electricity, and to all who consume that electricity. The issues raised here are now pending in scores of administrative proceedings before the Interior Board of Land Appeals and nearly a dozen judicial proceedings in federal district courts within the Ninth, Tenth and District of Columbia Circuits.³ The issues now before this Court will be raised in probably hundreds of additional administrative and judicial proceedings that will arise as the nearly 500 remaining federal coal leases issued prior to FCLAA's enactment are readjusted.⁴ If the Court grants certiorari in this case, these issues will

³ See, e.g., *Peabody Coal Co. v. Hodel*, No. 87-1359 (D.D.C. filed May 20, 1987); *Colowyo Coal Co. v. Hodel*, No. 87-2325 (D.D.C. filed August 21, 1987); *Western Fuels-Utah, Inc. v. Hodel*, No. 87-2669 (D.D.C. filed September 29, 1987); *Consolidated Coal Co. & Chevron Coal Co. v. Hodel*, No. CV 85-361 BLG-JFB (D. Mont. filed December 2, 1985); *Ark Land Company v. Hodel*, No. C85-313K (D. Wyo. October 1, 1987); *Powderhorn Properties v. Hodel*, No. 87-K-350 (D. Colo. filed March 10, 1987); *Trapper Mining Inc. v. Hodel*, No. 87-Z-979 (D. Colo. filed July 2, 1987); *Exxon Coal U.S.A., Inc. v. Hodel*, No. C87-0088 (D. Wyo. filed March 4, 1987); *Meadowlark Farms, Inc. v. Hodel*, No. C87-0024 (D. Wyo. filed January 18, 1987).

⁴ There were 533 federal coal leases outstanding when FCLAA was enacted on August 4, 1976. See, e.g., H. Rep. 681, 94th Cong., 2d Sess. 10, Table 4, reprinted in 1976 U.S. Code Cong. & Ad. News 1943, 1945. An Office of Technology Assessment report indicates that, as of March 1986, 489 pre-FCLAA leases were outstanding. U.S. Congress, Office of Technology Assessment, "Potential Effects of Section 3 of the Federal Coal Leasing Amendments Act of 1976 — A Special Report," p. 31 (Washington, D.C. U.S. Government Printing Office, March 1986).

be definitively addressed and federal courts, the Department, federal coal lessees, and coal purchasers can be guided accordingly. If the Court delays certiorari, all will continue to flounder. If certiorari is granted after a conflict develops in the circuits, those whose cases are decided before that time may not benefit from this Court's review and action. Proper administration of the courts requires that certiorari be granted now.

II. THE TENTH CIRCUIT'S CONCLUSION THAT CONGRESS RESERVED UNRESTRICTED POWER TO CHANGE THE PROVISIONS OF PREVIOUSLY ISSUED INDETERMINATE COAL LEASES IS WHOLLY INCONSISTENT WITH PERTINENT STATUTORY AUTHORITY, LEGISLATIVE HISTORY, AND LONG-STANDING ADMINISTRATIVE CONSTRUCTION.

Section 7 of the Mineral Lands Leasing Act provided, prior to enactment of FCLAA, (i) that the Department is to issue "indeterminate" coal leases, (ii) that those indeterminate leases are granted on the "condition" that the Secretary may readjust lease terms at twenty-year intervals, and (iii) that the Secretary may readjust a lease at twenty-year intervals "unless otherwise provided by law."⁵ A key federal question presented is whether that statute reserved in Congress unrestricted authority to subject previously issued indeterminate federal coal leases to whatever new lease terms it later wished to impose. The Tenth Circuit held that it did.

The Tenth Circuit's conclusion conflicts with both the statutory language and the legislative intent of Mineral Lands Leasing Act Section 7. Section 7 specifically required grant of a unique kind of lease under federal law—an "indeterminate" lease rather

⁵ Mineral Lands Leasing Act Section 7 provided:

Leases shall be for indeterminate periods . . . [on the] condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of expiration of such periods. 30 U.S.C. § 207 (1970).

than a primary term or preferential right lease as mandated for other minerals⁶—because in Congress' judgment an indeterminate lease was necessary to provide stability "so that lessees will be willing to expend the money necessary for the thorough equipment of a large mine." 51 Cong. Rec. 14945 (1914) (Comments by Rep. Thomson); Solicitor's Opinion M-36939, 88 Interior Dec. 1003 (1981). The right of readjustment is narrow in keeping with the expansive rights granted by an indeterminate lease; the scope of the right to readjust is limited to lease modifications necessary to "meet materially changed conditions":

Provision is made in this bill for such an adjustment of the terms and conditions of the lease at the end of the 20-year period as may *meet materially changed conditions*. 51 Cong. Rec. 14945 (emphasis added).

Conditions, however, may materially change from time to time, and for this reason provision was made for readjustment of terms and conditions at the end of 20-year periods. S. Rep. 352, 61st Cong., 2d Sess. 3 (1914) (emphasis added).

And the "otherwise provided by law" statutory language, which merely modifies and is an aspect of the right of readjustment, is also narrow in keeping with the grant of broad, indeterminate

⁶ "Primary term" leases, which are granted for oil and gas, require that production be achieved within a short period of time to prevent lease termination. "Preferential right" leases, which are granted for minerals such as sodium, vest a preferential, "first refusal" right in the lessee to reacquire a lease if the lessee agrees to whatever new lease terms and conditions the Secretary wishes to impose. The Department has formally contrasted preferential right lease renewals, where a lessee must take or leave whatever new terms and conditions the government wishes to impose, with coal lease readjustments, where lease terms and conditions must be readjusted reasonably in a manner consistent with grant of an indeterminate term lease. See Solicitor's Opinion, "Sodium Lease Renewals," GFS (MIN) S0-4, p. 6 (1982). ("We are of the opinion that . . . Congress knew of, and intended that there be, a difference between indeterminate leases subject to readjustment and 20-year leases with a preference right of renewal").

lease rights. The right of readjustment does not effectively reserve in Congress a power to change an indeterminate lease into a preferential right lease where a lessee is afforded only a right of first refusal to reacquire a lease on whatever new terms the government may require. The right of readjustment—including the reserved Congressional power—must be exercised in a manner consistent with the rights granted and the policies served by an indeterminate lease—the federal government is authorized, in the words of Congress, “to adjust each case according to the conditions that are present, having due regard for markets, transportation, and other conditions.” H. Rep. 17, 62nd Cong., 2d Sess. 3, 4 (1916); H. Rep. 668, 61st Cong., 2d Sess. 3, 4 (1914).

The Tenth Circuit’s decision also conflicts with a half-century of consistent administrative construction of Mineral Lands Leasing Act Section 7 by the Department. While the statute provided:

that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods,

for over fifty years the Secretary granted leases such as those involved here that provided:

[The Secretary reserves] the right to reasonably readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and each succeeding 20-year period during the continuance of the lease unless otherwise provided by law at the time of the expiration of any such period.

By using the word “reasonably” and by deleting the statutory language “such readjustment of terms and conditions may be made as the Secretary of the Interior may determine” when he granted leases, the Secretary effectively interpreted the “unless otherwise provided by law” language as a limitation on the right of readjustment at twenty-year intervals, not as an unrestricted reservation of power to require imposition of terms and conditions

inconsistent with the grant of an indeterminate lease. That contemporaneous and long-standing construction of a statute cannot be set aside without real analysis—an analysis never undertaken by the Tenth Circuit—⁷ particularly where parties have relied upon that construction by investing billions of dollars. *See, e.g., Andrus v. Shell Oil Co.*, 446 U.S. 657, 667-68 (1980); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-58 (1978); *California v. Deseret Water, Oil and Irrigation Co.*, 243 U.S. 415, 421 (1917).

III. THE RETROACTIVE APPLICATION OF FCLAA IN THE ABSENCE OF ANY MANIFESTATION OF CONGRESSIONAL INTENT IS CLEARLY CONTRARY TO DECISIONS OF THIS COURT.

Even assuming, *arguendo*, that there are no limits on Congress' authority to impose whatever royalty and other terms it wishes when a pre-FCLAA, indeterminate lease is readjusted, a key federal question presented here is whether Congress exercised that authority and mandated through FCLAA the retroactive imposition of new burdens on leases that already had been developed. The Tenth Circuit held that Congress did so.

FCLAA statutory language does not support the Tenth Circuit's conclusion; to the contrary, while three other FCLAA provisions specifically refer to pre-FCLAA leases and are expressly applicable to them, nothing in FCLAA Section 6—the section the

⁷ The argument that the "unless provided by law" language vests unrestricted authority in Congress to change indeterminate lease terms in any manner it wishes was only made in passing by the Secretary in the proceedings below—it was relegated to a footnote and referred to a federal district court case other than the FMC case where that argument had been expressly rejected. Secretary's Opening Brief, p. 27, n.11. Consequently, the argument was not satisfactorily briefed by the parties and was not soundly analyzed by the Court of Appeals. Colowyo respectfully submits that such summary treatment is unwarranted where so much is at stake.

Secretary relies on here—does so.⁸ FCLAA legislative history does not support the Tenth Circuit's conclusion; to the contrary, while legislative history describing the three FCLAA provisions identified above refers to pre-FCLAA leases, nothing in the legislative history surrounding FCLAA Section 6 does so.⁹ The Tenth Circuit's conclusion is supported only by silence—the Tenth Circuit held that “we find nothing in our reading of FCLAA (1976), or its legislative history, to indicate that FCLAA (1976) was *not* to be applied to pre-FCLAA leases on their post-FCLAA anniversary date.” *FMC Wyoming Corp. v. Hodel*, 816 F.2d at 501 (emphasis added).¹⁰

Silence is not enough. This Court has held that “a retrospective operation will not be given to a statute which interferes with

⁸ See, e.g., FCLAA Section 3, 30 U.S.C. § 201(a)(2)(A) (1982) (specifically prevents the Secretary from issuing new leases to holders of pre-FCLAA leases who have not achieved commercial production by a prescribed time); FCLAA Section 5, 30 U.S.C. § 202(a)(5) (1982) (specifically provides that “leases issued before the enactment of this Act [FCLAA] may be included “in a logical mining unit”); FCLAA Section 13, 30 U.S.C. § 203 (1982) (specifically authorizes the Secretary to modify pre-FCLAA leases by grant of additional federal land).

⁹ See, e.g., H. Rep. 681, 94th Cong., 2d Sess. 15, *reprinted in* 1976 U.S. Code Cong. & Ad. News 1943, 1951 (Pursuant to FCLAA Section 3, “Lessees would be prohibited from acquiring any *new federal lease* should they continue to hold *old leases* . . . without production therefrom” (emphasis added)); 122 Cong. Rec. 489 (1976) (FCLAA provisions are applicable “upon the inclusion of an *existing lease* in a logical mining unit” (emphasis added)); H. Rep. 681 at 26, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 1962 (“[FCLAA Section 13] amends [Mineral Lands Leasing Act] Section 3 to allow *modification of existing leases*” (emphasis added)).

¹⁰ The Tenth Circuit's holding also rests upon the fact that when Congress amended FCLAA in 1978 it did not expressly provide that FCLAA Section 6 was not to be imposed upon pre-FCLAA leases at readjustment. 816 F.2d at 501, n.11. That conclusion cannot withstand scrutiny. In 1978 Congress considered and *rejected* an amendment that would have made clear that FCLAA Section 6 requirements *are* applicable to pre-FCLAA leases. Compare 124 Cong. Rec. 30, 372-73 (1978) with the Coal Leasing Amendments Act of 1978, Pub.L. 95-554, 92 Stat. 2073. Far from supporting the Tenth Circuit's decision, history surrounding the 1978 amendments supports our position.

antecedent rights unless such be the unequivocal and inflexible import of the terms and manifest intention of the legislature.”¹¹ *Greene v. United States*, 376 U.S. 149, 166 (1964); *Union Pacific Railroad Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913). In concluding otherwise, the Tenth Circuit acted contrary to settled law developed by this Court.

CONCLUSION

For these reasons Colowyo respectfully prays this Court to grant certiorari in this case. If certiorari is granted, petitioner will demonstrate to this Court that the Department must examine materially changed conditions that have arisen subsequent to the last readjustment of a pre-FCLAA lease and must impose royalty and other terms that are fair to both lessees and the United States.

Respectfully submitted,

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¹¹ The Tenth Circuit’s retroactivity error is not obviated by the fact that pre-FCLAA leases are readjusted after FCLAA’s enactment because pre-FCLAA lessees’ antecedent rights in indeterminate leases that may be readjusted only as necessary “to meet materially changed conditions” would be indisputably lost by operation of a statute enacted years after those rights vested. The loss of a vested right by application of a subsequently enacted statute is precisely the circumstance where legal principles preventing retroactive application of a statute come into play.

